Supreme Court, U.S.
FILED
JUN 14 2004
OFFICE OF THE CLERK

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Nos. 03-892 and 03-907

In the Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN W. BANKS, II

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SIGITAS J. BANAITIS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

JOINT APPENDIX

THEODORE B. OLSON
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

RUSSELL R. YOUNG
MAYER, BROWN, ROWE & MAW LLP
190 South LaSalle Street
Chicago, Illinois 60603
(312) 701-7745

Counsel of Record
for Respondent Banks

JOSEPH WETZEL
WETZEL DEFRANG & SANDOR
300 Dayton Building
838 S.W. First Avenue
Portland, Oregon 97204
(503) 220-0299

Counsel of Record
for Respondent Banaitis

PETITIONS FOR WRIT OF CERTIORARI FILED:
DEC. 19, 2003 & DEC. 24, 2003
CERTIORARI GRANTED: MAR. 29, 2004

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-2171

JOHN W. BANKS, II, PETITIONER - APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT - APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
8/30/01	Tax Court Case Docketed. Notice filed by Appellant John W. Banks. (ert) [01-2171]
	* * * * *
3/12/03	CAUSE ARGUED on 3/12/03 by James R. Carty for Appellant John W. Banks in 01-2171/2177, Kenneth W. Rosenberg for Appellee CIR in 01-2171/2177, before Judges Moore, Clay, Lawson. [01-2171, 01-2177] (me) [01-2171 01-2177]
9/30/03	OPINION filed: The tax court's decision that Petitioner's California federal court suit settlement proceeds were not excludable from gross income under 26 U.S.C. 104 is AFFIRMED. The tax court's deter-

DATE	PROCEEDINGS
	mination that the contingency fees Petitioner paid his attorney constituted taxable income is REVERSED and the tax court's ruling that Petitioner could not deduct his alimony payments for the taxable 1990 year based on "duty of consistency" doctrine is REVERSED. The case is REMANDED to the tax court for further consideration. Decision for publication pursuant to local rule 206 [01-2171, 01-2177]. Karen N. Moore, Circuit Judge (concurring in part, dissenting in part), Eric L. Clay, Authoring Judge, David M. Lawson, District Judge. (dtk) [01-2171 01-2177]
9/30/03	JUDGMENT: AFFIRMED in part REVERSED in part and REMANDED (dtk) [01-2171 01-2177]
11/24/03	MANDATE ISSUED with no cost taxed [01-2171, 01-2177] (rgf) [01-2171 01-2177]

* * * * *

UNITED STATES TAX COURT

No. 18096-97

JOHN W. BANKS, II, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
09/02/97	0001	PF Petition Filed: Fee Paid; R 09/04/97
10/27/97	0004	ACS ANSWER (C/S 10/24/97).
	* * * * *	
03/20/00	0028	TRL TRIAL before Judge Laro at Chicago, IL SUB 03/27/00 Also called 3/24 & 3/27. Not called 3/28. 3/20 Pretrial conference held. Record held open for Resp. mot. for sanctions due 4/3/00 & Petr. John Banks, reply due 4/10/00.
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
03/20/00	0030	ATP AMENDMENT TO PETITION (CHI), R 04/07/00
	* * * * *	
03/24/00	0031	STP STIPULATION OF FACTS w/Ex. (CHI)
	* * * * *	
03/24/00	0033	ATA AMENDMENT TO ANSWER (CHI); P 04/07/00C
	* * * * *	
02/28/01	0060	MOP 5 MEMORANDUM OPINION, Judge Laro T.C. Memo. 2001-48. (Decisions will be entered under Rule 155.) B 02/28/01C
	* * * * *	
05/21/01	0066	DEC DECISION ENTERED, Judge Laro; B 05/21/01C
	APPELLATE PROCEEDINGS	
08/21/01	0067	NOAP Notice of Appeal by petr. to U.S.C.A., 6th Cir. Fee Paid; B 08/22/01C
	* * * * *	

UNITED STATES TAX COURT

No. 18096-97

JOHN W. BANKS, II, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

[Filed: Sept. 2, 1997]

PETITION

The Petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in the Commissioner's notice of deficiency dated May 30, 1997, and as the basis for the Petitioner's case alleges as follows:

1. Petitioner is an individual with mailing address now at 2138 Glen Road, Benton Harbor Michigan 49022. Petitioner's taxpayer identification number is 429-74-4519. The returns for the periods here involved were filed with the Office of Internal Revenue Service at Ogden, Utah.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the Petitioner on May 30, 1997, and was issued by the Office of the Internal Revenue Service at Sacramento, California.

3. The deficiencies as determined by the Commissioner are in income taxes for the calendar years 1988,

1990 and 1991, in the amounts of $11,707, $101,168 and $8,722, of which $11,707, $101,168 and $8,722, respectively, are in dispute.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

a) The Commissioner erroneously disallowed the net operating loss carryover for 1988, 1989, 1990 and 1991, in the amounts of $101,365, $67,104, $64,698 and $64,445.

b) The Commissioner erroneously included income with respect to the Title VII settlement in the amount of $464,000.

c) The Commissioner erroneously determined additional self-employment taxes in 1988 in the amount of $4,569. The Commissioner erroneously determined alternative minimum taxes for 1988 and 1990, in the amounts of $11,782 and $10,625.

5. The facts upon which the Petitioner relies, as the basis of Petitioner's case, are as follows:

a) Petitioner is entitled to the net operating loss carryovers in 1988, 1989, 1990 and 1991, in the amounts of $101,365, $67,106, $64,698 and $64,445.

b) Petitioner is not required to realize or recognize income from the Title VII settlement in 1990 in the amount of $464,000.

c) The Petitioner had no self-employment income in 1988, and therefore the self-employment taxes of $4,569 are not applicable.

d) The Petitioner is not liable for the alternative minimum taxes in 1988 and 1990, in the amounts of $11,782 and $10,625.

e) The Petitioner incurred and realized unspecified ordinary and capital losses in the years 1988, 1989 and 1990, in an amount exceeding $4,000,000. These losses were incurred in the years during this Tax Court case. The Petitioner filed bankruptcy through counsel in 1986, and was discharged in bankruptcy in 1990. The Petitioner had a cost basis in excess of $4,000,000 for the assets that were a part of the bankruptcy and the Petitioner only realized $3,500 at the time of discharge from the Bankruptcy Court in 1990. The Petitioner was both a dealer in property and had a partnership interest in the Frenchtown Hills and Auburn Bluff Projects. Most of these losses were never originally claimed by Petitioner's CPA, Eric Waddell. These losses are either allowable in 1990, the year of the bankruptcy discharge or in the alternative, in each year as they are sold by the Trustee for the Bankruptcy Court, John Roberts. The Forms 1041 that were filed by the Trustee were filed in the years 1986 through 1990. The final return from the bankruptcy was filed in 1990. The cumulative losses for the bankruptcy that were reported on the final Form 1041 for 1990 were $77,765. The $77,765 losses are ordinary income losses on Mr. Bank's Form 1040 for 1990 that were not reported and claimed by Eric Waddell. These represent additional ordinary losses for the 1990 year.

These losses will generate additional net operating losses of $4,000,000 for the years 1988, 1989, 1990 or 1991 . The Petitioner was previously levied by the IRS in 1990 or 1991 for some of these years. If the additional losses are allowed, these will generate a tax refund plus interest for the Petitioner for funds taken pursuant to the IRS levy in 1991 or 1992. Petitioner believes based upon best available information, that the

amount available for a refund is approximately $40,000 plus interest from the time the funds were levied by the IRS in 1990 or 1991, or an estimate of $65,000 - $80,000, with interest.

WHEREFORE Petitioner prays that:

1) There are no deficiencies due and owing from the Petitioner for the taxable years 1988, 1989 and 1990;

2) That the Court approve tax refunds for funds previously taken by the IRS pursuant to a levy in 1991 or 1992.

3) For such other and further relief as the Court shall deem proper.

Respectfully submitted,

ADMITTED U.S. TAX COURT

Dated: August 27, 1997

/s/ MICHAEL P. CASTERTON
MICHAEL P. CASTERTON, CM0383
CINNAMON, CASTERTON & HAGEDORN
1515 River Park Drive,
2nd Floor
Sacramento, CA 95815
916 929-6800

UNITED STATES TAX COURT

Nos. 18096-97, 18097-97

JOHN W. BANKS, II, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

STIPULATION OF FACTS

In accordance with Tax Court Rule 91(e), the below-signed parties agree to this Stipulation of Facts pursuant to the general terms of this preamble unless specifically expressed otherwise. The following statements may be accepted as facts and all exhibits referred to herein and attached hereto may be accepted as authentic and are incorporated in this stipulation and made a part hereof; provided that either party may introduce other and further evidence not inconsistent with the facts herein stipulated. The truth of assertions within stipulated exhibits may be rebutted or corroborated with additional evidence. All evidentiary objections except materiality and relevancy are waived unless specifically expressed within this stipulation. All copies shall be considered electronic reproductions of the originals and shall be treated as if originals.

VENUE AND JURISDICTION

1. At the time the petition in this case was filed, petitioners John W. Banks II ("John W. Banks") and

Nora J. Banks ("Nora Banks") each resided at 2138 Glen Road, Benton Harbor, Michigan 49022-6615.

2. A copy of the notice of deficiency dated May 30, 1997, upon which the case at Docket No. 18096-97 is based, is attached hereto as **Exhibit 1-J.**

3. A copy of the notice of deficiency dated May 30, 1997, upon which the case at Docket No. 18097-97 is based, is attached hereto as **Exhibit 2-J.**

INCOME TAX-RETURNS

4. A copy of petitioner John W. Banks's 1988 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 3-J.**

5. A copy of petitioner John W. Banks's 1989 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 4-J.**

6. A copy of petitioner John W. Banks's 1990 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 5-J.**

7. A copy of petitioner John W. Banks's 1991 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 6-J.**

8. John W. Banks and Nora Banks were married in late 1992.

9. John W. Banks and Nora Banks filed a 1992 Form 1040 ("U.S. Individual Income Tax Return") electing married filing jointly.

10. A copy of petitioners' 1992 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 7-J.**

THE STATE OF CALIFORNIA DEPARTMENT OF EDUCATION LAWSUITS FILED BY JOHN W. BANKS

11. During the years 1972 through July 14, 1986, petitioner John W. Banks was employed as an educational consultant by the Department of Education, State of California.

12. In 1983, John W. Banks filed a charge with the Equal Employment Opportunity Commission ("EEOC") against the California State Department of Education.

13. By letter dated April 20, 1984, the Civil Right Division of the EEOC notified John W. Banks that he had the right to file a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, against the California State Department of Education. A copy of said letter is attached hereto as **Exhibit 8-J.** This letter is a jurisdictional prerequisite to filing suit in Federal District Court under the aforementioned statute, pursuant to 42 U.S.C. 2000e-5(f)(1).

14. On June 28, 1984, petitioner John W. Banks filed a complaint against William Honig, et al. (including the State Department of Education, State of California), in Docket No. 84CIVS-0836, under 42 U.S.C. 2000e, Title *VII* , and 42 U.S.C. 1981.

15. On January 15, 1985, John W. Banks filed a Second Amended Complaint in Docket No. 84-CIVS-0836, under 42 U.S.C. 2000e, Title VII, and under 42 U.S.C. § 1983. A copy of that complaint is attached hereto as **Exhibit 9-J.**

16. Petitioner's employment with the California State Department of Education was terminated on July 14, 1986.

17. On November 25, 1987, petitioner John W. Banks filed suit against William Honig, et al. (including the State Department of Education, State of California), as Docket No. 87-CIVS-1658, under 42 U.S.C. 2000e and 42 U.S.C. 1983.

18. Docket No. 87-CIVS-1658 was consolidated with Docket No. 84-0836 on January 19, 1989, with Docket No. 84-0836 becoming the lead case.

19. A copy of the court's pretrial order dated September 22, 1989, is attached hereto as **Exhibit 10-J.**

20. The trial in the consolidated cases commenced on May 1, 1990, continuing for nine days.

21. The parties settled the cases prior to judgment by the court and entered into a settlement agreement and release. A copy of that Settlement Agreement and Release, dated May 30, 1990, is attached hereto as **Exhibit 11-J.**

22. The cases were dismissed on March 30, 1990 by Judge Lawrence K. Karlton.

23. Copies of the docket sheets for Docket Nos. 84-CIVS-0836 and 87-CIVS-1658 are attached hereto as **Group Exhibits 12-J.**

JOHN W. BANKS'S BANKRUPTCY CASE

24 On July 29, 1986, petitioner John W. Banks filed a voluntary petition in the United States Bankruptcy Court for the Eastern District of California. That petition was assigned Docket No. 286-03775-D-7. A copy of that petition, together with attached schedules, is attached hereto as **Exhibit 13-J.**

25. On August 8, 1986, the U.S. Bankruptcy Court appointed John Roberts, Inc., as Interim Trustee of the

debtor estate of John W. Banks II, Docket No. 286-03775. A copy of that order is attached hereto as **Exhibit 14-J.**

26. On August 25, 1986, John R. Roberts filed an application requesting an order from the bankruptcy court approving the employment of a firm to market and sell a real estate subdivision known as Frenchtown Hills which was an asset of the bankruptcy estate. A copy of said application is attached hereto as **Exhibit 15-J.**

27. On April 19, 1993, the Trustee filed the Trustee's Final Report and Proposed Distribution in Case No. 286-03775-B-7. A copy of that report is attached hereto as **Exhibit 16-J.**

28. On July 19, 1993, the Bankruptcy Court entered its Order Approving Trustee's Final Report and Order for Payment of Dividends. A copy of said order is attached hereto as **Exhibit 17-J.**

29. On October 29, 1993, the Trustee filed the Trustee's Report of Final Account and Request for Closing and Discharge of Trustee. A copy of that report with attached certification of review by the United States Trustee dated November 24, 1993, is attached hereto as **Exhibit 18-J.**

30. On December 29, 1993, the Bankruptcy Court entered its Final Decree ordering the bankruptcy estate closed. A copy of that order is attached hereto as **Exhibit 19-J.**

PETITIONERS' DIVORCE

31. John W. Banks and Nora Banks, now known as Nora Jefferson, were divorced in 1999, with the Judgment of Divorce becoming final on October 8, 1999.

32. A copy of the Judgment of Divorce in the case John Wesley Banks, II v. Nora Jefferson Banks, Case No. 98-2463-DO-M, Berrien County Trial Court - Family Division, State of Michigan, is attached hereto as **Exhibit 20-J.**

ADDITIONAL RETURNS

33. A copy of petitioner John W. Banks's 1983 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 21-R.**

34. A copy of petitioner John W. Banks's 1984 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 22-R.**

35. A copy of petitioner John W. Banks's 1985 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 23-R.**

36. A copy of petitioner John W. Banks's 1986 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 24-R.**

37. A copy of petitioner John W. Banks's 1987 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 25-R.**

38. A copy of petitioner John W. Banks's 1987 Form 1040X ("Amended U.S. Individual Income Tax Return") is attached hereto as **Exhibit 26-R.**

39. A copy of petitioners John W. Banks's and Nora J. Banks's 1993 Form 1040 ("U.S. Individual Income Tax Return") is attached hereto as **Exhibit 27-R.**

John W. Banks II and Verna Jo Banks Divorce-Proceedings and Related Matters

40. A copy of a pleading entitled "Deposit in Lieu of Undertaking for Stay Pending Appeal," In re the

Marriage of Verna J. Banks and John W. Banks II, Docket No. 748218, Superior Court of California, County of Sacramento, is attached hereto as **Exhibit 28-R.**

41. A copy of a pleading entitled "Ruling on Submitted Matter," dated October 30, 1998, In re the Marriage of Verna J. Banks and John W. Banks II, Docket No. 748218, Superior Court of California, County of Sacramento, is attached hereto as **Exhibit 29-R.**

42. A copy of a pleading entitled "Declaration of Jay-Allen Eisen in Support of Motion for Attorney Fees and for Enforcement Order," In re the Marriage of Verna J. Banks and John W. Banks II, Docket No. 748218, Superior Court of California, County of Sacramento, is attached hereto as **Exhibit 30-R.**

43. A copy of a pleading entitled "Points and Authorities in Support of Motion for Attorney Fees," In re the Marriage of Verna J. Banks and John W. Banks II, Docket No. 748218, Superior Court of California, County of Sacramento, is attached hereto as **Exhibit 31-R.**

44. A copy of a pleading entitled "Order Awarding Attorney Fees and Costs on Appeal," In re the Marriage of Verna J. Banks and John W. Banks II, Docket No. 748218, Superior Court of California, County of Sacramento, is attached hereto as **Exhibit 32-R.**

45. A copy of a facsimile transmission from James B. Macy, Attorney, to John Banks, dated March 9, 1993, together with attached pleadings entitled "Notice of Entry of Judgment," "Order Fixing Amount Due Petitioner for her Community Property Interest in

Respondent's Military Retired Pay from Date of Separation to Date Respondent Filed Bankruptcy," "Notice of Entry of Judgment," and "Order on Stipulation," all dated March 5, 1993, is attached hereto as **Exhibit 33-R.**

STUART L. BROWN
Chief Counsel
Internal Revenue Service

[Signature illegible]
WILLIAM J. WISE
Counsel for Petitioner
John W. Banks II
Wise and Stracks
Twenty North Clark Street
Suite 1000
Chicago, Illinois 60602
Telephone: (312) 236-6556

By: /s/ LINDA C. GROBE
LINDA C. GROBE
Attorney
Tax Court Bar
No. GL0351

/s/ NORA J. BANKS
NORA J. BANKS
Petitioner
2138 Glen Road
Benton Harbor, Michigan
49022

/s/ WILLIAM E. BOGNER
WILLIAM E. BOGNER
Assistant District Counsel
Tax Court Bar No. BW0357
200 West Adams Street
Suite 2300
Chicago, Illinois 60606
Telephone: (312) 886-9225

Date: [3/22/00]

Date: [MAR 22, 2000]

Internal Revenue Service | **Department of the Treasury**

CERTIFIED MAIL: 100941346 | Date: 30 May, 1997

In Reply Refer to:
W:AP:SAC:DS:JF
Person to Contact:
DAVE SMITH
Contact Telephone Number:
(916) 974-5815
TIN: 429-74-4519

JOHN W. BANKS, II
2138 GLEN ROAD
BENTON, HARBOR, MI
49022-6615

Tax Year Ended:	Deficiency
December 31, 1988	$ 11,707.00
December 31, 1990	$ 101,168.00
December 31, 1991	$ 8,772.00

Dear Taxpayer:

We determined that you owe an additional amount, as shown above. This letter is your NOTICE OF DEFICIENCY as required by law. The enclosed statement shows how we figure the deficiency.

If you want to contest this deficiency in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside the United States) to file a petition with the United States Tax Court for a redetermination of the deficiency. To get a petition form and the rules for filing a petition, write to: United States Tax Court, 400 Second Street NW, Washington, D.C. 20217.

Send the completed petition form, a copy of this letter, and a copy of all statements and schedules you received with this letter, to the Tax Court at the same address.

The time you have to file a petition with the Court (90 or 150 days) is fixed by law. The Court cannot consider your case if you file the petition later.

If this letter is addressed to both husband and wife, and both want to petition the Tax Court, both must sign and file the petition or each must file a separate, signed petition. If only one of you petitions the Tax Court, the full amount of the deficiency will be assessed against the non-petitioning spouse.

Small Tax Cases

The Tax Court has a simplified procedure for small tax cases, when the amount in dispute is $10,000 or less for any one tax year. You can get information about this procedure, as well as a petition form, by writing to the Clerk of the United States Tax Court at the court address shown in the second paragraph above. You should write promptly if you intend to file a petition with the court.

If you decide not to file a petition with the Tax Court, please sign and return the enclosed waiver form. This will permit us to assess the deficiency quickly and will limit the accumulation of interest. The enclosed envelope is for your convenience.

If you are a C corporation, under Internal Revenue Code Section 6621(c), large corporate underpayments may be subject to a higher rate of interest than the normal rate of interest for underpayments.

If you decide not to sign and return the waiver, and you don't file a petition with the Tax Court within the time limit, the law requires us to assess and bill you for the deficiency after 90 days from the above mailing date (150 days if this letter is addressed to you outside the United States).

If you have any questions about this letter, you may call or write to the person whose name is shown above. If the telephone number is outside your local calling area, you will be charged for a long distance call. If you write, please attach a copy of this letter to help us identify your account. Also, include your daytime telephone number so we can call you if necessary.

Sincerely yours,
Margaret Milner Richardson
Commissioner
by

[SIGNATURE ILLEGIBLE]

Associate Chief
Appeals Office

Enclosures:
Copy of this letter
Statement
Waiver
Envelope

Northern California Appeals
Sacramento Office
3310 El Camino Avenue
Suite 170
Sacramento, CA 95821-6308 Ltr 894 (RO)(Rev.4-93)

Internal Revenue Service | **Department of the Treasury**

CERTIFIED MAIL: 100941345 | Date: 30 May, 1997

In Reply Refer to:
W:AP:SAC:DS:JF
Person to Contact:
DAVE SMITH
Contact Telephone Number:
(916) 974-5815
TIN: 429-74-4519

JOHN W. BANKS, II AND
NORA J. JEFFERSON-BANKS
2138 GLEN ROAD
BENTON, HARBOR, MI
49022-6615

Tax Year Ended:	Deficiency
December 31, 1992	$ 24,654.00

Dear Taxpayer:

We determined that you owe an additional amount, as shown above. This letter is your NOTICE OF DEFICIENCY as required by law. The enclosed statement shows how we figure the deficiency.

If you want to contest this deficiency in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside the United States) to file a petition with the United States Tax Court for a redetermination of the deficiency. To get a petition form and the rules for filing a petition, write to: United States Tax Court, 400 Second Street NW, Washington, D.C. 20217.

Send the completed petition form, a copy of this letter, and a copy of all statements and schedules you

received with this letter to the Tax Court at the same address.

The time you have to file a petition with the Court (90 or 150 days) is fixed by law. The Court cannot consider your case if you file the petition later.

If this letter is addressed to both husband and wife, and both want to petition the Tax Court, both must sign and file the petition or each must file a separate, signed petition. If only one of you petitions the Tax Court, the full amount of the deficiency will be assessed against the non-petitioning spouse.

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The Tax Court has a simplified procedure for small tax cases, when the amount in dispute is $10,000 or less any one tax year. You can get information about this procedure, as well as a petition form, by writing to the Clerk of the United States Tax Court at the court address shown in the second paragraph above. You should write promptly if you intend to file a petition with the court.

If you decide not to file a petition with the Tax Court, please sign and return the enclosed waiver form. This will permit us to assess the deficiency quickly and will limit the accumulation of interest. The enclosed envelope is for your convenience.

If you are a C corporation, under Internal Revenue Code Section 6621(c), large corporate underpayments may be subject to a higher rate of interest than the normal rate of interest for underpayments.

If you decide not to sign and return the waiver, and you don't file a petition with the Tax Court within the time limit, the law requires us to assess and bill you for

the deficiency after 90 days from the above mailing date (150 days if this letter is addressed to you outside the United States).

If you have any questions about this letter, you may call or write to the person whose name is shown above. If the telephone number is outside your local calling area, you will be charged for a long distance call. If you write, please attach a copy of this letter to help us identify your account. Also, include your daytime telephone number so we can call you if necessary.

Sincerely yours,
Margaret Milner Richardson
Commissioner
by

/s/ A.M. SPOONS
Associate Chief
Appeals Office

Enclosures:
Copy of this letter
Statement
Waiver
Envelope

Northern California Appeals
Sacramento Office
3310 El Camino Avenue
Suite 170
Sacramento, CA 95821-6308 Ltr 894(RO)(Rev.4-93)

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release is entered into by and between plaintiff John Banks (plaintiff) and defendants California State Department of Education (Department), et. al. in the federal actions, No. CIV S-84-836, and No. CIV 87-1658, as of May 30, 1990.

RECITALS

A. Plaintiff was employed as a consultant by the California State Department of Education until his discharge effective July 14, 1986.

B. Plaintiff brought actions against named defendants and the California State Department of Education in United States District Court, Case Nos. CIV S-84-836, and CIV 87-1658.

C. The parties desire to compromise and settle all claims which are, have been, or could have been asserted by plaintiff against defendants.

D. The parties consider the confidentiality of the term of this Settlement Agreement to be a material and fundamental element of the compromise between them. The parties have determined that maintaining the terms of this Settlement Agreement as confidential will serve each of their individual best interests.

E. This Settlement Agreement is not an admission of any liability or wrongdoing by any party, nor shall it be construed or deemed to be evidence of any liability or wrongdoing, nor an admission that plaintiff's claims are without substantial merit.

COVENANTS

NOW, THEREFORE, in consideration of the mutual promises and covenants met forth herein, the parties agree as follows.,

1. The Department agrees object to pay to plaintiff of the sum of $464,000.00 in full and complete satisfaction of his claims. Plaintiff characterizes this payment of $464,000.00 as payment for personal injury damages suffered after plaintiff's discharge on July 14, 1986.

2. Plaintiff may repay his Public Employees Retirement System (PERS) account from the amount he receives as noted in paragraph 1 if PERS permits such repayment. Defendant will not object to a court order providing for plaintiff's reinstatement to his PERS membership upon plaintiff's payment of all sums previously withdrawn from his PERS retirement account.

3. Plaintiff gives up any right he has to reinstatement with the Department and shall make no application for employment to the California Department of Education or compete in any examinations offered by the Department.

4. Any employment inquiry made to the Department about plaintiff shall be referred to the Department Personnel officer. The Personnel Officer shall state that plaintiff was a consultant with the Vocational Education Unit. The Personnel Officer shall also tell the person inquiring that Dr. Xavier Del Buono, who is now retired from the Department was plaintiff's last supervisor and is the appropriate person to speak to regarding plaintiff's work performance.

5. In response to any inquiries concerning this matter, the parties shall state the following:

> The parties have resolved their differences to their mutual satisfaction and neither party admits any wrongdoing. We have no further comment.

The parties and their attorneys agree that no comment other than the above shall be made concerning this matter.

6. Plaintiff agree that he will not enter any building which is occupied solely by the State Department of Education or any office space occupied solely by the State Department of Education without prior written permission from the Department of Education Personnel Officer. The written permission shall be obtained by mail or telecopier.

7. Plaintiff shall immediately upon payment pursuant to Paragraph I dismiss with prejudice in its entirety, this litigation and all other pending litigation, complaints and claims against defendants and any of them.

8. The parties and their attorneys agree that they will keep the terms and amount of this Settlement Agreement completely confidential and that they will not hereafter disclose any information concerning this Settlement Agreement to anyone, regardless of whether that information is accurate or not, except as required to comply with any applicable laws. This provision will not, however, preclude any party from disclosing the fact that the litigation has been "resolved" and that plaintiff is no longer employed by the California State Department of Education.

In the event that either party (including their attorneys) violates the confidentiality provision, they will be liable to the other party in the amount of $20,000.00 for each disclosure as well as the non-disclosing party's reasonable attorneys' fee. The parties agree that the actual amount of damage that would be suffered as a result of breach of this confidentiality provision is dependant upon many circumstances and it, therefore, would be impracticable and difficult to fix the amount of damages. Accordingly, the parties agree that, if the arbitrator finds a breech, the amount of $20,000.00 will be paid as liquidated damages, and not as a penalty or forfeiture.

If on party has a good faith belief that another party has violated this confidentiality provision, which is denied by the allegedly disclosing party, the matter will be subject to binding arbitration before an arbitrator selected by the American Arbitration Association and will be subject to AAA procedures. Prior to any arbitration, the parties shall most and confer informally is an effort to, resolve the matter.

9. In the event that either party violates any provision of this settlement agreement other than the confidentiality provision, that party will be liable to the other up to the amount of $20,000.00 for each breach as well as reasonable attorneys' fees.

If one party has a good faith belief that another party has breached any provision of this Settlement Agreement, which is denied by the other party, the matter will be subject to binding arbitration before and arbitrator selected by the American Arbitration Association and will be subject to AAA procedures. Prior to any arbitration, the parties shall meet and confer informally in an effort to resolve the matter.

10. The federal district court shall maintain jurisdiction for a period of two years for

the purpose of reviewing any arbitration decision made pursuant to paragraphs 8 and 9, if necessary. The parties agree that the public interest, in the terms of this agreement remaining confidential outweighs the public interest, if any, served by their disclosure.

11. Plaintiff, on behalf of himself, his heirs, executors, administrators, successors assigns and the trustee, hereby voluntarily and on the conditions and terms that are specified in this Settlement Agreement, releases and forever discharges the named defendants, California State Department of Education, its officers, managers, employees, agents, attorneys and all others acting an their behalf, from any and all claims, demands, actions and causes of action, of any and every sort, whether known or unknown, which were or could have been asserted in any court for any matter or facts related to this lawsuit or to plaintiff's employment with the California State Department of Education.

12. It is understood and agreed that this is a full and final settlement and release of all unknown, undisclosed and/or unanticipated injuries, debts or damages now known, disclosed and/or anticipated. Having consulted with attorney, plaintiff expressly waives and relinquishes any and all rights and benefits which he now has, or in the future may have, under Section 1542 of the Civil Code of the State of California, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if

known by him most have materially affected his settlement with the debtor.

13. It is understood and agreed that this Settlement Agreement and all documents executed in relation thereto are not an admission of any liability and shall not be construed as an admission of liability by any of the defendants, nor shall any of the above be construed or deemed to be evidence of the admission on the part of the parties of any liability or wrongdoing whatsoever. The Settlement Agreement shall not be offered or received in evidence for any purpose other than for the enforcement or interpretation of this Settlement Agreement.

14. Each party is to pay its own costs and attorneys fees.

15. This Settlement Agreement constitutes the entire agreement between the parties and fully supercedes any and all prior agreements and understandings, written or oral, between the parties pertaining to the subject matter hereto.

16. The parties represent and agree that they have reviewed all aspects of this Agreement with their respective attorneys, that they have carefully read and fully understand all the provisions of this Agreement, and that they are voluntarily entering into this Agreement.

17. The parties represent and agree that in executing this Agreement they do not rely and have not relied upon any representation or statement made by any of the parties or by any of the parties' agents, attorneys or representatives with regard to the subject matter, basis or effect of this Settlement Agreement or

otherwise, other than those specifically stated in this written Settlement Agreement.

18. This Settlement Agreement shall be interpreted in accordance with the plain meaning of its terms and not strictly for or against any party hereto.

Dated: May [30,] 1990 /s/ JOHN BANKS
JOHN BANKS, Plaintiff

Dated: May [30,] 1990 /s/ CARLOS M. ALCALA
CARLOS M. ALCALA
Attorney for Plaintiff

Dated: May [30,] 1990 /s/ WILLIAN D. DAWSON
WILLIAM D. DAWSON for
Defendant California
Department of Education

Dated: May [30,] 1990 /s/ JOSEPH R. SYMKOWICK
JOSEPH R. SYMKOWICK
General Counsel
California Department of
Education

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

Case No. 748218

VERA JO BANKS, PETITIONER

v.

JOHN W. BANKS, II, RESPONDENTS

[Filed: Sept. 12, 1990]

DECLARATION OF CARLOS ALCALA

I, Carlos Alcala, Declare as follows:

1. I am an attorney at law licensed to practice before all courts in the state of California

2. I represented respondent John W. Banks in a civil action in the United States District Court, Eastern District of California against William Honig, The Department of Education, et al.

3. In May of 1990 the case settled. In June of 1990, a settlement check made payable to both myself and John Banks was received in my office;

4. To date, John Banks has refused to endorse said check stating I am owed fees and cost pursuant to our fee agreement; Accordingly, the check has set in my drawer, losing a considerable amount of interest;

5. The amount of money in dispute (over attorney's fees and costs) is $184.000.00;

6. I have offered to Mr. Banks to put the disputed attorney's fees and costs ($184,000.00) into an interest bearing trust account until our dispute can be resolved through a county bar fee arbitration, and pay the balance to him. This amount of money (the difference between the amount of the settlement and the $184,00.00 I claim is due me) is clearly Mr. Banks money, yet he refuses to endorse the check so I can give him the funds. I am informed and believe that when Mr. Banks receives the proceeds of the settlement, he is under an order to deliver the proceeds of the settlement to Ms. Ossola to be placed in trust;

7. Since it in neither in my interest nor Mr. Bank's interest to have a considerable sum of money sitting in my drawer, I hereby represent that I will do the following:

a. I will endorse the check provided I am permitted to take the sum of $184,000.00 and deposit the same in an interest bearing trust account until my dispute with John Banks is received;

This will protect Mr. Banks' alleged interest in the money in the event it is determined he is owed some portion of the fees and cost in dispute;

b. I will deposit the balance of the funds (representing Mr. Banks' money) with the court clerk.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 11, 1990, at Sacramento, California.

/s/ CARLOS ALCALA
CARLOS ALCALA

UNITED STATES TAX COURT

Nos. 18096-97 and 18097-97

IN THE MATTER OF:
JOHN W. BANKS, II, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

VOLUME I

TRANSCRIPT OF PROCEEDINGS

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reaching a final answer.

Q. All right. When the amount was paid by the State, how was it paid?

A. They gave a check to both of us in one check for the total amount.

MR. WISE: Oh, Your Honor, there is one item that I—this brings to mind, and I want to do this on the record. We withdraw any claim for additional legal fees with respect to Carlos Alcala over and above the amount allowed in the statutory notice. That's now a part of this case.

THE COURT: Counsel?

MS. GROBE: Yes. I understand Petitioner is conceding the claim for the additional $34,000.

Respondent accepts the concession.

THE COURT: Very good. Thank you.

MR. WISE: Thank you.

BY MR. WISE:

Q. Now, would you tell the Court what—so this was put into account with both of your signatures?

A. Yes.

Q. How was that money disbursed? To whom? I'm sorry.

A. There was a court document which directed that those monies that had been borrowed from the PERS [88] retirement fund which I had borrowed for use to pay my legal fees be returned and that PERS would accept it and reenter me back into membership. That amount was something to the point of about 35-, 3,600, something like that.

However, there was, another addition made to that, which was the interest that you must pay on that loan. They had passed a new policy. And so I had to bring up another 1,200-and-some dollars to add to the first check, which was 35—about *600*, to the best of my memory

Q. All right.

A. And you added it together it comes very, very close—if not 37,000 is what I'm trying to say. That's close.

Q. Very good. 37—what else was that money paid to?

A. 85,000 went to my ex-spouse, which we'd just got a divorce two years earlier—six years earlier. Then there was monies to my other attorney—

Q. How much?

A. 45,000.

Q. Who was your other attorney?

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A. Loreen McMasters.

Q. What did he do for you to earn the 45,000?

A. He was—he filed the first case in this particular process. Then while the money was in the bank—I believe it was still in the bank—Mrs. Arena, who is a person—employee in the IRS—

Q. Internal Revenue Service.

A. —Internal Revenue Service there in Sacramento, she removed $93,000 from it. Mr. Carlos was my attorney—150,000 legal fees. There was 14,000 that had been taken from my check for what they had alleged to have been misuse of property or something, and after that that's all I know.

Q. You can remember.

Now, I want to talk about Mr. McMaster a little bit more. How much did you say you paid him?

A. From that check, 45,000.

Q. $45,000. Okay. So—

MR. WISE: Your Honor, if I may? In my amendment I asked for additional expenses of the lawsuit, and I'm not withdrawing my amendment asking for it, and I want to make this clear on the record. We are withdrawing any claim for additional payments to Carlos Alcala but we are offering in evidence this testimony on payment to another attorney in the case. I think that's—wanted to be clear on the record that that is what that amendment is for.

UNITED STATES TAX COURT

Nos. 18096-97 and 18097-97

IN THE MATTER OF:
JOHN W. BANKS, II, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

VOLUME II

TRANSCRIPT OF PROCEEDINGS

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dishonest in the way he treated me. He—we had a—I had a contract with him for $185,000 which was just my percentage because I was working on a contingency fee; he wasn't paying me by the hour. I took the case very late, I put a lot of time into it, I mean an exorbitant amount of time. And then when it came to the settlement, he would not sign the check, and he insisted on leaving it unsigned for a long period of time, knowing that it would cause me severe duress.

And it was not until he knew that he had me over a barrel that he said, Okay, we'll go into arbitration—I think John will remember this—and unless you take $150,000, you know, take a $35,000 cut—you know, after you've worked for a person that hard and you've done everything you're supposed to do and you kept your end of the bargain, and they do that type of thing

to you, and then they come back to you and they say, Would you represent me again, I mean, what's any logical, reasonable person going to say? They're going to say no, absolutely not. And then he threatened me because I wouldn't represent him.

Q. Mr. Alcala, I believe you also testified that there was, in your recollection, perhaps a small amount of actual personal injuries, medical damages in this case. Is that correct?

CERTIFIED MAIL

Mr. John Banks
4643 Paula Way
Fair Oaks, California 95628

Re: EEOC Charge Against California State Department of Education
No. 091831406

Dear Mr. Banks:

Because you filed the above charge with the Equal Employment Opportunity Commission, and more than 180 days have elapsed since the date the Commission assumed jurisdiction over that charge, and no suit based thereon has been filed by this Department, and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice. If you are unable to retain an attorney, the Court is authorized *in its discretion* to appoint an attorney to represent you and to authorize commencement of the suit without payment of fees, costs, or security. In order to apply for an appointed attorney, you should, *well before the expiration of the above 90-day period*, take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States District Court in Sacramento.

The investigative file pertaining to your case is located in the EEOC District Office, 10 United Nations Plaza, 4th Floor, San Francisco, California 94102.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: HERBERT A. GOLDSMITH, JR.
HERBERT A. GOLDSMITH, JR.
Attorney
Employment Litigation Section

cc: EEOC District Office
California State Department of Education

[Attorneys for Plaintiff Omitted]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIVS 84 0836 LKK

JOHN BANKS, PLAINTIFF

v.

WILLIAM HONIG, DONALD MCKINLEY, DAVIS CAMPBELL, RICHARD POND, RICHARD MESA, RAMIRO D. REYES, ROBERT A. CERVANTES, TOMAS LOPEZ, JAMES R. SMITH, STATE DEPARTMENT OF EDUCATION, STATE OF CALIFORNIA, DEFENDANTS

SECOND AMENDED COMPLAINT; DEMAND FOR JURY TRIAL

[Filed: Jan. 15, 1986]

Plaintiff Alleges:

JURISDICTION

1. This action arises under the United States Constitution, particularly the Fourteenth Amendment thereof, and under federal law, particularly (a) The Civil Rights Act of 1866, 42 U.S.C. providing for the equal rights of persons in every state and territory within the jurisdiction of the United States to make and enter contracts; and, (b) 42 U.S.C. § 1983, providing for relief against any person who, under color of statute,

deprives another of any rights, privileges, or immunities received by the Constitution and laws, and (c) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 providing for relief against discrimination in employment.

Plaintiff brings this action for injunctive relief and damages to compensate him for the economic loss and other damages caused by defendants' unlawful employment practice and acts of harassment committed against plaintiff because plaintiff is a member of the Negro race.

2. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1337 and 1343, and 42 U.S.C. § 2000e-5(f)(3).

3. In addition, this is an action to redress unlawful discriminating employment practices under California Government Code §12965 (Count Three), for damages for intentional infliction of emotional distress arising under California State Law (Count Four), and for slander arising under California State Law (Counts Five and Six).

The actions alleged in Counts Three, Four, Five, and Six, are based on the same operative facts as those giving rise to federal claims set forth in Counts One and Two as hereinafter more clearly appears. Because these actions involve common defendants and matters of proof, judicial economy, convenience, and fairness to the parties herein will result if the Court assumes and exercises jurisdiction of the action for redress of unlawful discriminating employment practices which is alleged in Count Three, intentional infliction of emotional distress which is alleged in Count Four, and for slander which is alleged in Counts Five and Six.

ALLEGATIONS COMMON TO ALL COUNTS

4. Plaintiff is a black male citizen of the United States and a member of the Negro race who has been employed by Defendant State Department of Education since January 1972. Plaintiff resides in Sacramento County, California.

5. Defendants at all times material hereto were duly appointed, employed, and acting officers and supervisorial employees in the California State Department of Education, a Department of the government of the State of California.

6. Defendant William Honig is sued both in his individual capacity and in his capacity as the duly elected California Superintendent of Public Instruction and head of the State Department of Education. Plaintiff is informed and believes and thereon alleges that defendant Honig is a resident of the County of Sacramento, State of California and maintains his principal place of business in said county.

7. Defendants Donald McKinley and Davis Campbell are former employees of the Department of Education. Defendants Richard Pond, Richard Mesa, Ramiro D. Reyes, Robert A. Cervantes, Tomas Lopez, and James R. Smith are all employees of the California State Department of Education and are sued in both their individual and official capacities. Plaintiff is informed and believes that said defendants are all residents of the County of Sacramento, State of California and maintain their principal place of business in said County.

8. Defendant State Department of Education is a department of the State Government of the State of California and is headed by defendant William Honig.

Said Department has its principal place of business in Sacramento, California, and is an agency of defendant State of California and is an employer within the meaning of 42 U.S.C. § 2000e(b) in that it is engaged in an industry effecting commerce and employs more than 15 persons and is an employer within the meaning of Government Code § 12926(c) as the State, a subdivision thereof, or a person acting as an agent of an employer.

9. The unlawful employment practices alleged herein were committed within the State of California, and within the County of Sacramento.

FIRST COUNT

10. Each and all the acts of defendants alleged herein were done under color and pretense of the statutes, ordinances, regulations, customs and usages of the State Department of Education and the State of California, and under the authority of officers as officials and supervisory employees of the State Department of Education.

11. During the time plaintiff was employed by defendant State of California, and defendant—State Department of Education, and during the period September 15, 1982 to June 20, 1984, and continuing, and again during the period June 27, 1983 to June 20, 1984, and continuing, said defendants, and their agents, officers, and employees discriminated against plaintiff with respect to the terms, conditions, and privileges of his employment because of plaintiff's race and color in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981 and 1983, and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) and California Government Code §§ 12920 et seq. Such discrimination consisted in part of unfounded complaints and

allegations made by individual defendants Honig, McKinley, Campbell, Pond, Mesa, Reyes, Cervantes, Lopez, and Smith, in their official capacities as plaintiff's supervisors, concerning plaintiff's work; plaintiffs assignments by individual defendants Lopez and Cervantes to perform menial, demeaning, duties or no duties at all; and repeated racial insults and slurs concerning plaintiff, in plaintiffs presence, by individual defendants Reyes, and Mesa. By reason of such unlawful discriminatory treatment, plaintiff has suffered humiliation and has been denied promotional and other professional appointments, all to plaintiff's damage in an amount subject to proof.

12. Defendants and each of them, have committed the following and unlawful additional discriminatory practices toward plaintiff during the period September 9, 1979 through and including September 9, 1981 to and including June 20, 1983, and again during the period June 27, 1983 through and including the date of filing this complaint, and continuing thereafter:

A. Denied plaintiff promotion to a management position on the basis that plaintiff was black and the white employees in the Department did not want to be supervised by a black person.

B. Denied plaintiff promotion to Administrator II position in the Department of Education on the sole basis that plaintiff is black, despite the fact that plaintiff placed number three on the employment list for said position.

C. Placed plaintiff number 26 on a list following an Administrator I Examination in 1982 for the stated reason that plaintiff had no field experience despite the fact that the qualifications and experience required for

such position did not include field experience and despite the fact that other candidates that placed higher on said examination had no field experience. The sole basis that plaintiff was placed number 26 on said list was because plaintiff is black. Other employees that were not black and had lesser qualifications than plaintiff and had no field experience were placed higher on the list.

D. Failed plaintiff in an examination for an Administrator II position in Migrant Education Section on the sole basis that plaintiff is black. Only Hispanic males were deemed to be qualified and passed said examination despite the fact that said Hispanic male candidates did not possess the minimum qualifications in the form of required credentials and experience, while plaintiff met all requirements and satisfied the minimum qualifications and had all required credentials and had the necessary experience.

E. Cancelled an examination for the position of Vocational Education Director. Assistant Superintendent CEA, when plaintiff applied to take such examination on the sole basis that plaintiff is black for the purpose of preventing plaintiff from, competing fairly for such position. Instead the position was filled without an examination and plaintiff was not permitted to participate in competition for the position on the sole basis that plaintiff is black.

F. Prevented plaintiff from attending and participating in seminars, workshops, educational conferences and the like related to plaintiff's area of expertise and assignment in Vocational Education and Migrant Education on the sole basis that plaintiff is black. At the time plaintiff was not allowed to attend such, Hispanic and white employees. were allowed to attend and

participate in such seminars, workshops, and conferences.

G. Removed plaintiff from management of a migrant vocational education project because Hispanic and white employees did not want to work for a black employee.

H. Arbitrarily transferred plaintiff to the Migrant Education section from the Vocational Education section on the sole basis that plaintiff is black.

I. Refused to assign plaintiff a work station when he was assigned to Migrant Education on the sole basis that plaintiff is black. Appropriate work stations were assigned to Hispanic and white employees in Migrant Education.

J. Denied promotions to plaintiff while assigned to Migrant Education Section under a policy which provided for promotion of persons of Hispanic descent only to the exclusion of blacks.

K. Refused to assign plaintiff duties and responsibilities appropriate to his position on the basis that plaintiff is a black man. Other employees that are Caucasian or of Hispanic descent have been assigned duties. Plaintiff was informed by defendants Cervantes, Lopez, and Reyes, that they did not want black persons doing any work on vocational education projects and for such reason plaintiff was not assigned respective duties.

L. Harassed by Hispanic Managers defendants Reyes, Lopez, and Cervantes, of the defendant Department for the sole reason that plaintiff is black. Such activity was authorized, condoned, and ratified by the other named defendants.

M. Defendants Cervantes and Pond monitored plaintiff's activities while assigned under his supervision including noting phone calls, time arrived and time deported and related matters for the reason that plaintiff is black. No similar surveillance was done with respect to white or Hispanic employees. Such activity was authorized, condoned, and sanctioned by defendants Lopez, Smith, Mesa and Honig.

N. Defendants and each of them, employed and authorized surveillance and following of plaintiff at all hours of the day and night to public and private business, including watching plaintiff's house since 1979 and continuing thereafter to the present on the sole basis that plaintiff is black. No similar surveillance was conducted on white and Hispanic employees.

O. Maintained a secret file on plaintiff containing negative comments while no secret file is kept on white employees and while the keeping of a secret file is prohibited by law.

P. Denied plaintiff educational leave with pay on six separate occasions for completion of defendant's Ed. D. program while at the same time granting such leave to white employees of the department.

Q. Terminated plaintiff's daughter, who had independently and without knowledge of plaintiff obtained employment in the defendant Department, for the stated reason that she was related to plaintiff and that related persons could not be employed by the Department. The true reasons why plaintiff's daughter was terminated was because she and plaintiff are black—in that many related white employees are employed by the Department despite being related and have not been terminated under such an alleged policy.

R. Plaintiff is informed and believes and thereon alleges that in addition to the practice enumerated in this paragraph, defendants, and each of them, has engaged in discriminatory practices which are not yet fully known by plaintiff.

13. As a proximate result of the conduct of defendants and each of them, plaintiff necessarily incurred expenses for medical and hospital care in an amount not yet ascertained and subject to proof. Plaintiff is informed and believes and thereon alleges that he will be required to incur medical and hospital expenses in the future in an amount subject to proof.

14. The acts of defendants, and each of them, were arbitrary and capricious and constituted discrimination based upon plaintiff's race and violated plaintiff's rights under the equal protest clause of the Fourteenth Amendment to the United States Constitution.

15. The conduct of defendants and each of them, deprived. plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States: the right not to be deprived of life, liberty, or property, without the process of law and the right of equal protection of the laws secured by the Fourteenth Amendment, to the Constitution of the United States, all to plaintiff's general damage in an amount subject to proof.

16. As a direct and proximate result of the wrongful acts by the defendants, and each of them, plaintiff has suffered actual damages in an amount not yet ascertained and subject to proof and will continue to suffer damage for the humiliation and embarrassment caused by defendants and each of them by reason of plaintiff's race and color.

17. The acts, conduct and behavior of defendants and each of them were performed knowingly, intentionally and maliciously by reason of which plaintiff is entitled to an award of punitive damages.

18. Pursuant to Civil Rights Act of 1866, 42 U.S.C. § 1981, et seq., plaintiff seeks to be made whole for back pay from the date he would have been promoted from the present back to September 9, 1979, less interim earnings, in the amount pursuant to applicable law. Pursuant. to the Civil Rights Act of 1866, 42 U.S.C. § 1983, plaintiff seeks damages in order to redress him for the deprivation of rights, privileges, and immunities secured by the Constitution and laws of the United States.

19. Plaintiff also seeks an award of attorneys fees incurred in prosecuting this action pursuant to applicable law.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

SECOND COUNT

20. Plaintiff has filed a timely charge against defendants with the Equal Employment Opportunity Commission alleging denial of individual rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. The United States Department of Justice, United States Attorney, has given permission to plaintiff to sue defendants pursuant to Title VII of the Civil Rights Act of 1964 by issuing a right to sue notice on April 20, 1984. A true and correct copy of such notice is attached hereto and marked Exhibit A. The allegations of this complaint are within the scope of the charge filed with the Equal Employment Opportunity

Commission and could reasonably have been expected to grow out of the charge filed.

21. This is a proceeding for a declaratory judgment as to plaintiff's rights and for a permanent injunction restraining defendants from maintaining a policy, practice, custom, or usage of discriminating against plaintiff and other black persons because of race with respect to compensation, terms, conditions. and privileges of employment and in ways that deprive plaintiff of equal employment opportunities and otherwise adversely affect his status as an employee because of race. This complaint also seeks restitution to plaintiff of all rights, privileges, benefits, and income that would have been received by him but for defendants' unlawful and discriminating practices.

22. Plaintiff incorporates by reference Paragraphs 10-12 of the First Count as though set forth in full herein.

23. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged. and this suit for injunctive relief is his only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from defendants' policy, practice, custom, and usage as set forth herein until and unless enjoined by the Court.

24. Pursuant to Title VII of the Civil Rights Act of 1964, plaintiff seeks to be made whole for back pay from the date he would have been promoted from the present back to September 9, 1981 (two years prior to the date EEOC took jurisdiction of the charge) less interim earnings of amounts comparable, in the amount to be determined by the Court.

25. Plaintiff also seeks an award of attorneys fees incurred in prosecuting this action pursuant to applicable law.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

THIRD COUNT

26. Plaintiff brings this action pursuant to California Government Code §12965 seeking to obtain redress for unlawful discrimination in employment committed by defendants.

27. Plaintiff has filed a timely charge with the California Department of Fair Employment and Housing in accordance with California Government Code §12960, which department issued a right to sue notice on September 19, 1983, advising plaintiff that he could file suit within one year of the date of such notice.

28. Plaintiff incorporates by this reference Paragraphs 10-12 of the First Count and Paragraph 23 of the Second Count as though set forth in full.

29. The effect of the policies and practices described in paragraphs 11 and 12 of the First Count, as incorporated in this Count, has been, and continues to be, discriminating against black persons such as plaintiff and has jeopardized his job, tended to deprive him of employment opportunities, caused him damage, and otherwise affect his status as an employee, all in violation of California Government Code § 12920, et seq.

30. Pursuant to California Government Code § 12965 plaintiff seeks to be made whole for back pay from the date he would have been promoted to the present, and seeks damages to compensate him for the harm, humiliation, harassment, and discrimination suffered.

31. Pursuant to California Government Code § 12965, plaintiff seeks an award of attorneys fees incurred in prosecuting this action.

FOURTH COUNT

32. Plaintiff incorporates by this reference Paragraphs 10-12 of the First Count as though set forth in full.

33. Defendants' conduct as hereinbefore set forth was intentional and malicious and done for the purpose of causing plaintiff to severe emotional and physical distress. Defendants willfully and maliciously conspired to, and did, in fact, intimidate and humiliate defendant through a series of acts, confrontations, personal and professional insults, racial slurs, and unequal discriminatory employment practices. Defendants knew, or should have known, by reason of his nationality and background, was particularly susceptible to emotional distress from defendants' conduct. Defendants condoned and ratified that conduct with the knowledge that plaintiff's emotional and physical distress, would thereby increase, and was done with a wanton and reckless disregard of the consequences to the plaintiff.

34. As a further proximate result of the aforementioned acts, plaintiff was required to and did employ physicians and surgeons to examine, treat and care for him, and incurred additional medical expenses for doctors and drugs in an amount which has not yet been ascertained. Plaintiff is informed and believes and thereon alleges that he will incur some additional medical expense, the exact amount of which is unknown. When said sums are ascertained, plaintiff will

seek leave to amend this complaint to insert the true amounts.

35. As a proximate result of the aforementioned acts, plaintiff suffered humiliation, mental anguish, and emotional distress and physical distress and has been impaired in mind and body, all to plaintiffs general damage in the sum of $1,000,000.00 (One Million Dollars).

36. By reason of the aforementioned acts, plaintiff was prevented from attending to his usual occupation and profession as an employee of the Department of Education and as a part time financial consultant, financial planner, life insurance salesman, securities dealer and dealer in partnership interests in real estate partnerships and thereby lost earnings and sustained losses in the total sum of $4,500.000.00 ($4.5 Million).

37. The aforementioned acts of defendants and each of them were willful, wanton, malicious, and oppressive, and justify the awarding of punitive and, exemplary damages in the sum of $1,000,000.00 (One Million Dollars).

WHEREFORE, plaintiff prays for relieve as hereinafter set forth.

FIFTH COUNT

38. During the period April 1980 to June 20, 1984, and continuing and again within the period beginning within one year prior to the filing of this action, defendants Pond, Cervantes, Mesa, Reyes, and Campbell stated the following concerning plaintiff: Plaintiff was dishonest, was a schemer, committed illegal acts, was a liar, was going to jail, could not be trusted, and

materials to conduct private business, was unqualified, and incompetent. Such statements were and are false.

39. The words were heard by fellow employees of the Department of Education, and existing and potential business clients of plaintiff at that time.

40. These words were slanderous per se because they charge the plaintiff with being convicted and punished for committing a crime ("he is going to jail"), and further charge plaintiff with the crime of theft and obtaining property by false pretenses.

41. The words were understood by those who saw and heard them in a way in which defamed plaintiff because those that were clients of plaintiff cancelled their business relationship with plaintiff and those who were not clients refused to enter into business relationships with plaintiff.

42. As a result of the above described words, plaintiff has suffered general damages to his reputation in the amount of subject to proof.

43. As a further proximate result of the above described words plaintiff has suffered the following special damages:

A. His life insurance sales license was cancelled to plaintiff's damage in an amount subject to proof.

B. His NASD securities salesperson license was cancelled to plaintiffs damage in an amount subject to proof.

C. His partnership interest in real property investments were destroyed to plaintiff's damage in an amount subject to proof.

D. He lost profits from business that was cancelled all to plaintiff's damage in the sum of $4,500,000.00 ($4.5 Million).

44. As a further proximate result of the above described words, plaintiff has suffered mental anguish and emotional distress and was injured in his mind and body incurred medical and hospital expenses, incurred expense from doctors and drugs to his damage in an amount not fully ascertained. When said sums are ascertained, plaintiff will seek leave to amend this complaint to insert the true amount.

45. The above described words were spoken by defendants Pond, Reyes, Cervantes, and Campbell, knowing that they had no cause to believe the statements, and were made with the intent to disgrace plaintiff because of their feelings of hatred and ill will toward the plaintiff and with a desire to oppress plaintiff. Thus, the awarding of punitive and exemplary damages in the amount of $1,000,000.00 (One Million Dollars) is justified.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

SIXTH COUNT

46. Plaintiff incorporates by reference paragraphs 4-8 of the First Count as though set forth in full herein.

47. During the period April 1980 to June 20, 1984, and continuing, and again within the period beginning within one year prior to the filing of this action, defendants Pond, Cervantes, Mesa, Reyes, and Campbell stated the following concerning plaintiff: Plaintiff was dishonest, was a schemer, committed illegal acts, was a liar, was going to jail, could not be trusted,

improperly used State time and materials to conduct private business, was unqualified, and incompetent. Such statements were and are false.

48. The words were heard by fellow employees of the Department of Education, and existing and potential business clients of plaintiff at that time.

49. These words were slanderous per se because they tend to injure plaintiff in his profession and business as a financial planner, securities dealer, life insurance salesperson, and salesman of partnership interest in real estate partnerships by imputing to him theft, dishonesty, other illegal acts, and being a liar which tends to generally disqualify him from the practice of such professions and businesses and has a natural tendency to lessen the profits of the plaintiff's profession and business as a financial planner, securities dealer, life insurance salesman and salesman of partnership interests in real estate partnerships.

50. As a result of the above described words, plaintiff has suffered general damages to his reputation in the amount of $1,000,000.00 (One Million Dollars).

51. As a further proximate result of the above described words, plaintiff has suffered the following special damages:

A. His life insurance sales license was cancelled;

B. His NASD securities salesperson license was cancelled;

C. His partnership interests in real property investments were destroyed;

D. He lost profits from business that was cancelled all to plaintiff's damage in a sum subject to proof.

52. As a further proximate result of the above described words, plaintiff has suffered mental anguish, and emotional distress and was injured in his mind and body, incurred medical and hospital expenses, incurred expenses for doctors and drugs, all to his damage in an amount not fully ascertained. When said sums are ascertained, plaintiff will seek leave to amend this complaint to insert the true amount.

53. The above described words were spoken by defendants Pond, Cervantes, Reyes, and Campbell, knowing that they had no cause to believe the statements, and were made with the intent to disgrace plaintiff because of their feelings of hatred and ill will, towards the plaintiff and with a desire to oppress plaintiff and thus the awarding of punitive and exemplary damages in the amount of $1,000,000.00 (One Million Dollars) is justified.

WHEREFORE, plaintiff requests the following relief be granted:

ON THE FIRST COUNT

1. For general damages for violation of plaintiff's constitutional rights.
2. For medical and hospital expenses in an amount subject to proof;
3. For future medical and hospital expenses in an amount subject to proof;
4. For punitive and exemplary damages In an amount determined by the trier of fact;

5. For reasonable attorneys fees incurred in the prosecution of this action;

6. For costs of suit herein incurred;

7. For such other and further relief that the Court may deem just and proper.

ON THE SECOND AND THIRD COUNTS

1. An order requiring defendants and each of them to promote plaintiff to the position of Administrator II, in the State Department of Education;

2. An order requiring defendants, and each of them, to make whole by appropriate back pay and related employee benefits, and damages to plaintiff because of being adversely affected by discrimination on account of race in the part of defendants;

3. For general damages to compensate plaintiff for the harm, humiliation, and discrimination suffered in an amount according to proof;

4. An order granting plaintiff a preliminary and permanent injunction restraining defendants, their agents, successors, employees, attorneys, and all others acting in concert with defendants or under defendants' direction from discriminating on the basis of race or color, and requiring them to undertake remedial action to eradicate any effects of past discrimination;

5. An order awarding reasonable attorneys' fees and costs; and,

6. An order granting such further relief as the court deems proper.

ON THE FOURTH COUNT

1. For general damages in the sum of $1,000.000.00 (One Million Dollars);
2. For medical, hospital and related expenses according to proof;
3. For lost earnings and losses sustained in the sum of $1,000,000.00 (One Million Dollars);
4. For exemplary and-punitive damages in the sum of $1,000,000-00 (One Million Dollars);
5. For costs of suit herein incurred;
6. For such other and further relief that the court may" deem just and proper.

ON THE FIFTH COUNT

1. For general damages to plaintiff's reputation in the sum of $1,000,000.00 (One Million Dollars);
2. For special damages for lost profits and losses sustained in the sum of $4,500,000.00 ($4.5 Million);
3. For medical, hospital, and related expenses according to proof;
4. For exemplary and punitive damages in the sum of $1,000,000.00 (One Million Dollars);
5. For costs of suit herein incurred;
6. For such other and further relief that the Court may deem just and proper.

ON THE SIXTH COUNT

1. For general damages to plaintiff's reputation in the sum of $1,000,000.00 (One Million Dollars);

2. For special damages for lost profits and losses sustained the sum of $4,500,000.00 ($4.5 Million);
3. For medical, hospital, and related expenses according to proof;
4. For exemplary and punitive damages in the sum of $1,000,000.00 (One Million Dollars);
5. For costs of suit herein incurred:
6. For such other and further relief that the Court may deem just and proper.

DATED: January 14, 1985

LOREN E. MCMASTER
Attorney for Plaintiff

DEMAND FOR JURY

Plaintiff demands trial by jury on the issues in this complaint that are triable of right by jury.

DATED: January 14, 1985

LOREN E. MCMASTER
Attorney for Plaintiff

I declare that:

I am (a resident of employed in) the county of Sacramento California.
County where mailing occurred)

I am over the age of eighteen years and not a party of the within entitled cause, my business/residence address is 900 G Street, Suite 2, Sacramento, California 95814

On January 15, 1985, I served the attached SECOND
Date
AMENDED COMPLAINT; DEMAND FOR JURY TRIAL on the other parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail a t Sacramento, California address as follows.

Margaret Rodda
Deputy'Attorney General
1515 K Street, Suite 511
Sacramento, California 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 15, 1985, at Sacramento California.
[DATE] [PLACE]

TRACI ZAVALA /s/ TRACI ZAVALA
[TYPE OR PRINT NAME] SIGNATURE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-70421

SIGITAS BANAITIS, ET AL., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

DOCKET ENTRIES

DATE	PROCEEDINGS
3/13/02	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: Fee payment is due 3/27/02; record is due 4/16/02; petitioner's opening brief is due 5/28/02; respondent's brief is due 6/25/02; optional reply brief is due 7/9/02; [02-70421] (tm) [02-70421]
	* * * * *
2/14/03	ARGUED AND SUBMITTED TO Robert R. Beezer, Sidney R. Thomas, Richard R. Clifton [02-70421] (pi) [02-70421]
	* * * * *

DATE	PROCEEDINGS
8/27/03	FILED OPINION: AFFIRMED IN PART, REVERSED IN PART. (Terminated on the Merits after Oral Hearing; Other; Written, Signed, Published. Robert R. Beezer; Sidney R. THOMAS, author; Richard R. Clifton.) FILED AND ENTERED JUDGMENT. [02-70421] (je) [02-70421]
10/24/03	MANDATE ISSUED [02-70421] (je) [02-70421]

* * * * *

UNITED STATES TAX COURT

Docket No. 4323-00

SIGITAS BANAITIS, ET AL., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
04/18/00	0001	PF PETITION Filed: Fee Paid R 04/19/00
04/18/00	0002	DPT DESIGNATION of Trial at Portland, ORR 04/19/00
06/07/00	0003	ACS ANSWER (C/S 06/02/00).
09/08/00	0004	NTD NOTICE of Trial on 02/12/01 at Portland, OR. B 09/08/00 C

DATE	DOCKET NUMBER	PROCEEDINGS
09/08/00	0005	SPTO STANDING PRE-TRIAL ORDER attached to Notice of Trial B 09/08/00 C
10/10/00	0006	MOTP MOTION by petr. to Amend Petition. (Amd. Pet. Ld.) (C/S 10/6/00 GR 10/11/00 B 10/12/00 C)
10/11/00	0007	AP AMENDED PETITION R 10/12/00
11/14/00	0008	AAP ANSWER TO AMENDED PETITION (C/S 11/13/00).
02/12/01	0009	TRL TRIAL before Judge Gerber at Portland, OR; Also called 2/14. OPENING BRIEFS DUE: 5/15/01; REPLY BRIEFS DUE: 6/29/01; SUBMITTED TO JUDGE GERBER SUB 02/14/01
02/14/01	0010	STP STIPULATION OF FACTS w/Ex. (PTO)
03/12/01	0011	TRAN TRANSCRIPT of 2/14/01 rec'd. (TRL)
05/16/01	0012	BFR BRIEF for resp. (p.m.t.) P O5/21/0l C

DATE	DOCKET NUMBER	PROCEEDINGS
05/21/01	0013	BFP BRIEF for petr. C/S 5/15/01 (p.m.t.)
06/19/01	0014	RBFP REPLY BRIEF for petr. R 06/29/01
06/29/01	0015	RBFR REPLY BRIEF for resp. P 06/29/01 C
01/08/02	0016	MOP MEMORANDUM OPINION, Judge Gerber T.C. Memo. 2002-5 (Decision B will be entered for Resp.) 01/08/02 C
01/10/02	0017	DEC DECISION ENTERED, Judge Gerber B 01/10/02 C
		APPELLATE PROCEEDINGS
03/07/02	0018	NOAP NOTICE OF APPEAL by petr. to U.S.C.A., 9th Cir. C/S 02-25-02. FEE PAID. B 03/08/02 C
03/08/02	0019	NOFC NOTICE of Filing with copy of Not. of App. sent to the parties. B 03/08/02 C

UNITED STATES TAX COURT

Docket No. 4323-00

SIGITAS BANAITIS, ET AL., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

[Filed: Oct. 6, 2000]

AMENDED PETITION

Pursuant to 26 USC 6213(a), 26 USC 6214, and United States Tax Court Rule 34, petitioner, Sigitas J. Banaitis, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the Commissioner's notice of deficiency [service symbols AP:PNW:POR:90D:JOW:MH] dated March 24, 2000, and, as a basis for his case and the petition, alleges as follows:

1. (a) Petitioner, Sigitas J. Banaitis, is an individual with a current mailing address of:

23939 S.W. Gage Road
Wilsonville, Oregon 97070-6707.

(b) Petitioner's taxpayer identification number is 359-28-0184

c) Petitioner's individual federal income tax return, form 1040, for the tax year at issue, 1995, was timely filed with the Office of the Internal Revenue Service at the Service Center in Ogden, Utah.

2. The notice of deficiency, a copy (including all applicable schedules) of which is attached and marked as exhibit A, was mailed to petitioner on March 24, 2000, and was issued by the Internal Revenue Service Portland Appeals Office in Portland, Oregon.

3. The alleged deficiency in federal income tax is as follows:

Year	Alleged Deficiency
1995	$1,708,216.

The entire alleged deficiency is in dispute.

4. The alleged increases in tax set forth in the notice of deficiency are based on the following errors:

(a) an increase in taxable income in the amount of $6,682,139 for proceeds from a personal injury lawsuit;

(b) an increase in itemized deductions in the amount of $3,317,316 for lawyer fees belonging to the contingent fee lawyer;

(c) a decrease in itemized deductions attributed to the itemized deduction limitation in the amount of $219,568;

(d) an increase in alternative minimum tax in the amount of $288,798.

5. The facts upon which petitioner relies as a basis for his petition are as follows:

(a) All amounts received by petitioner as damages for past and future wages were received on account of personal injuries based on a claim for tort and tort

type rights and are properly excluded from gross income under 26 USC 104 (a) (2) (1989).

(b) All amounts received by petitioner as punitive damages were received on account of physical personal injuries based on a claim for tort and tort-type rights; and are properly excluded from gross income under 26 USC 104(a) (1989).

(c) All amounts received directly by petitioner's lawyer from the defendants of the lawsuit pursuant to a contingency fee agreement between petitioner and his; lawyer and the settlement agreement among petitioner, his lawyer, and the defendants are not gross income to petitioner under 26 USC 61 or under any other provision of law.

6. As an additional defense to respondent's notice of deficiency, petitioner alleges that the imposition of tax as set forth in respondent's notice of deficiency would violate the fifth amendment to the United States Constitution as a violation of due process of law and as taking of private property for public use without just compensation.

WHEREFORE, petitioner prays for a judgment of this court determining that the alleged deficiency is in error, determining that there is no income tax deficiency and that no further tax is due, and determining that petitioner has properly reported all income and paid all tax in accordance with the laws of the United States.

Respectfully submitted,

DATED: 06 Oct. 00

/s/ MICHAEL C. WETZEL
MICHAEL C. WETZEL, WM0539

/s/ JOSEPH WETZEL
JOSEPH WETZEL, WJ0903

/s/ [Signature Illegible]
RUSSELL A. SANDOR, SR 1076

Wetzel DeFrang & Sandor
300 Dayton Building
838 S.W. First Avenue
Portland, Oregon 977204
(503) 220-0299

INTERNAL REVENUE SERVICE
Western Region

DEPARTMENT OF THE TREASURY
Internal Revenue Service
Portland Appeals Office, MS0680
1220 S.W. Third Avenue
Room 1117
***Portland, OR* 97204**

AP: PNW:POR:90D:JOW:MH

S.S.N./E.I.N.: 359-28-0184
Person to Contact:
Mr. John O. Weiler

Contact Person Identification Number: 9-94880
Telephone number: (503) 326-2483
Last Day to File Petition with the United States Tax Court:
[JUN 22 2000]

Date: [MAR 24, 2000]

Sigitas J. Banaitis,
23939 S.W. Gage Road
Wilsonville, OR 97070-6707

CERTIFIED MAIL

Tax Year(s) Ended	**Increase In Tax**
December 31, 1995	$1,709,216.00

NOTICE OF DEFICIENCY

Dear Mr. Banaitis:

We determined that you owe an additional amount, as shown above. This letter is your **NOTICE OF DEFICIENCY**, as required by law. The enclosed statement shows how we figured the deficiency.

If you want to contest this deficiency in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside the United States) to file a petition with the United States Tax Court for a redetermination of the deficiency. To get a petition form and the rules for filing a petition, write to: United States Tax Court, 400 Second Street, NW, Washington, D.C. 20217.

Send the completed petition form, a copy of this letter and a copy of all statements and schedules you received with this letter to the Tax Court at the same address.

The time you have to file a petition with the Court (90 or 150 days) is fixed by law. The Court cannot consider your case if you fille the petition late.

If this letter is addressed to both husband and wife, and both want to petition the Tax Court, both must sign and file the petition or each must file a separate, signed petition. If only one of you petitions the Tax Court, the full amount of the deficiency will be assessed against the non-petitioning spouse.

Small Tax Cases

The Tax Court has a simplified procedure for small tax cases, when the amount in dispute is $50,000 or less for any one tax year. You can get information about this procedure, as well as a petition form, by writing to the Clerk of the United States Tax Court at the court address shown in the second paragraph above. You should write promptly if you intend to file a petition with the court.

If you decide not to file a petition with the Tax Court, please sign and return the enclosed waiver form. This will permit us to assess the deficiency quickly and will limit the accumulation of interest. The enclosed envelope is for your convenience.

If you are a "C" corporation, under Internal Revenue Code Section 6621(c) , large corporate underpayments may be subject to a higher rate of interest than the normal rate of interest for underpayments.

If you decide not to sign and return the waiver, and you don't file a petition with the Tax Court within the time limit, the law requires us to assess and bill you for the deficiency after 90 days from the above mailing date (150 davs if this letter is addressed to you outside the United States).

If you have questions about this letter, you may call or write to the person whose name is shown above. If the telephone number is outside your local calling area, you will be charged for a long distance call. If you write, please attach a copy of this letter to help us identify your account. Also, include your daytime telephone number so we can call you if necessary.

You also have the right to contact the office of the Taxpayer Advocate. However, you should first contact the person whose name and phone number are shown above since that person has direct access to your tax information resulting in this notice and can answer questions or concerns you might have. You can call 1-800-829-1040 and ask for a Taxpayer Advocates assistance. Or you can contact the Taxpayer Advocate for your local area. The local Taxpayer Advocate's address is 1220 S.W. Third Avenue, Mail Stop 0-405, Portland, Oregon 97204. The phone number is (503) 326-2333. Taxpayer Advocate assistance cannot be used as a substitute for established IRS procedures, formal appeals processes, etc. The Taxpayer Advocate is not able to reverse legal or technically correct tax determinations, nor extend the time fixed by law that you have to file a petition in the U.S. Tax Court. The Taxpayer Advocate can, however, see that a tax matter that may not have been resolved through normal channels, gets prompt and proper handling.

Sincerely,

CHARLES O. ROSSOTTI
Commissioner
by

/s/ Signature illegible
LES L. LUCAS
Associate Chief

Enclosures:
Copy of this letter
Waiver
Statement
Envelope

CC: Joseph Wetzel.

FORM 5278 (Rev 5-92)	**Department of the Treasury – Internal Revenue Service Statement – Income Tax Changes**	Schedule: 1
		Form No: 1040

Name of Taxpayer: **Sigitas J. Banaitis** SSN/EIN: 359-28-01134	_XX_ Notice of Deficiency ___ Other ___ Settlement Computation

	Tax Years Ended		
1. Adjustments to Income:	12/31/1995		
a) Litigation Award	$6,682,139.00		
b) Miscellaneous itemized Deductions	($3,317,316.00)		
c) Itemized Deductions Limitation	$219,568.00		
d)			
e)			
f)			
g)			
h)			
i)			
2. Total Adjustments	$3,584,391.00	$0.00	$0.00
3. Taxable Income As Shown In:			
Return as Filed	$1,465,622.00	$0.00	$0.00
4. Taxable Income As Revised	$5,050,013.00	$0.00	$0.00

Schedule 1—Continuation:

5. Tax Computed From: Tax Rates – Married Filing Separate – Schedule 2	$1,987,649.00	$0.00	$0.00
6. Alternative Tax - Schedule 2	$1,987,153.00		
7. Corrected Tax Liability	$1,987,153.00	$0.00	$0.00
8. Less Credits: a) b) c)			
9. Balance	$1,987,153.00	$0.00	$0.00
10. Other Taxes: a) Alternative Minimum Tax b) c)	$288,798. 00		
11. Total Corrected Tax Liability	$2,275,951.00	$0.00	$0.00
12. Total Tax Per Return as Filed	$567,735.00	$0.00	$0.00
13. Increase or (Decrease) in Tax	$1,708,216.00	$0.00	$0.00
14. Additions to Tax:			

Form

Sigitas J. Banaitis **Schedule 2**
SSN: 359-28-0184
Tax Year 1995

Computation of Tax

Regular Tax:

Taxable income from Schedule 1	$5,050,013.00
Tax bracket income	$128,250.00
Marginal income	$4,921,763.00
Marginal tax rate	39.6%
Marginal tax rate	$1,949,018.00
Tax on tax bracket income	$38,631.00
Total regular tax	$1,987,649.00

Alternative tax

1.	Taxable Income from Schedule 1	$5,050,013.00
2.	Lesser of long-term gain or net capital gain	$4,272.00
3.	Line 1 less line 2	$5,045,741.00
4.	Alternative amount based on filing status	$40,100.00
5.	Greater of line 3 or line 4	$5,045,741.00
6.	Line 1 less line 5	$4,272.00
7.	Tax on line 5 using tax rate schedules	$1,985,957.00
8.	Line 6 multiplied by 28%	$1,196.00
9.	Line 7 plus line 8	
	Alternative Capital Gain Tax	$1,987,153.00

Schedule 2—Continuation:

Taxable income from Schedule 1	$5,045,741.00
Tax bracket income	$128,250.00
Marginal income	$4,917,491.00
Marginal tax rate	39.6%
Marginal tax rate	$1,947,326.00
Tax on tax bracket income	$38,631.00
Total regular tax	$1,985,957.00

Sigitas J. Banaitis **Schedule 3**
SSN: 359-28-0184
Tax Year 1995

Miscellaneous Itemized Deductions

1. Miscellaneous expenses per return	$1,503.00
2. Additional attorney fees allowable	$2,478,929.00
3. Total expenses as corrected	$3,480,432.00
4. Limitation (2.0% of adjusted gross income)	$163,116.00
5. Allowable deduction (line 1 less line 2, but not less than $0.00)	$3,317,316.00

Computation of adjusted gross income:

Adjusted gross income per return or as previously adjusted	$1,473,685.00
Adjustments affecting adjusted gross income:	$6,682,139.00
1(a) Litigation Award	
Adjusted gross income as corrected	$8,155,824.00

Computation of Allowable Attorney Fees:

Total amount taxable	$5,646,389.00
Total amount received	$6,271,389.00
Taxable percentage (taxable amount/total received)	0.900341057
Total paid attorney	$3,864,012.00
Taxable percentage	0.900341057
Allowable expenses	$3,478,929.00

Sigitas J. Banaitis **Schedule 4**
SSN: 359-28-0184
Tax Year: 1995

Computation of Itemized Deduction Limitation

1.	Medical and dental expenses		$0.00
2.	Taxes		$10,515.00
3.	Interest		$12,416.00
4.	Charitable contributions		$8,518.00
5.	Miscellaneous deductions		$3,317,316.00
6.	Total itemized deductions		$3.348,765.00
7.	Investment interest		$2,217.00
8.	Line 6 less line 7		$3,346,548.00
9.	80% of line 8	$2,677,238.00	
10.	Adjusted cross incorne as corrected	$8,155.824.00	
11.	Exclusion	$57,350.00	
12.	Line 10 less line 11	11$8,098,474.00	
13.	Line 13 multiplied by 3%	$242,954.00	
14.	Lesser of lines 9 or 13		$242,954.00
15.	Allowable itemized deductions		$3,105,811.00
16.	Claimed per return (after adjustments)		$3,325,379.00
17.	Increase to taxable income		$219,568.00

Computation of adjusted gross income:

Adjusted gross income per the return	$1,473,685.00
Adjustments to AGI:	
1(a) Litigation Award	$6,682,139.00
Adjusted gross income as corrected	$8,155,824.00

Sigitas J. Banaitis **Schedule 5**
SSN: 359-28-0184
Tax Year: 1995

Computation of Alternative Minimum Tax

Part I - Adjustments & Preferences

1)	Standard Deduction (if you fternized deductions entered $0)	$0.00
2)	Medical & Dental. Enter smaller of Sch A line 4. or 2.5% of AGI	$0.00
3)	Taxes from Schedule A	$10,515.00
4)	Certain Interest on Home Mortgage	$0.00
5)	Misc Itemized: Deductions. Sch A line 26	$3,317,316.00
6)	Refund of Taxes (enter as negative number)	($245.00)
7)	investment Interest	$0.00
8)	Post '86 Depr. Difference between regular and AMT Depr.	$0.00
9)	Adjusted Gain or loss. Difference between regular and AM T	$0.00
10)	Incentive Stock Options	$0.00
11)	Passive Activities. Difference between Regular and AMT	$0.00
12)	Beneficiaries of Estates and Trusts	$0.00
13)	Tax Exempt Interest for private activity bonds	$0.00
14)	Other:	

Schedule 5—Continuation:

A) Contributions	$0.00	h) Loss Limitations	$0.00
b) Circulation Expenditures	$0.00	i) Mining Costs	$0.00
c) Depletion	$0.00	j) Patrons Adjustment	$0.00
d) Pre '87 Depreciation	$0.00	k) Pollution Control	$0.00
e) Installment Sales	$0.00	l) Research & Experiment	$0.00
f) Intangible Drilling Costs	$0.00	m) Tax Shelter Farm	$0.00
g) Long-Term contracts	$0.00	n) Related Adj's	$0.00
			0.00

15)	Total Adjustments and Preferences	3,327,586.00

Part II - Alternative Minimum Taxable Income

16)	Form 1040 line 35. (AGI less itemized Deductions)	$5,050,013.00
17)	Net Operating Loss Deduction	$0.00
18)	If AGI is over $114,700 ($57,350 for MFS) and you itemized deductions, enter amount from line 9 of worksheet for Sch A, line 28	$242,954.00)
19)	Combine lines 15 through 18	$8,134,645.00
20)	Alternative Tax Net Operating Loss Deduction	$0.00
21)	Alternative Minimum Taxable Income. Line 19 less line 20	$8,134,645.00

Schedule 5—Continuation:

Part III - Exemption Amount and Alternative Minimum Tax

22) Exemption Amount:

If your filing status is:	And line 21 in not over:	
Single or Head of Household	$112,500.00	$33,750.00
Married Filing Joint	$150,000.00	$45.000.00
		$0.00
Married Filing Separately	$75,000.00	$22,500.00

Line 22 Amount:
$0.00

If line 21 is over the amount shown above, see instructions

23)	Subtract line 22 from line 21	$8,134,645.00
24)	If line 23 is $175,000 or less ($87,500 if MFS), multiply line 23 by 26%. Otherwise multiply line 23 by 28% and subtract $3,500 ($1,750 if MFS)	
25)	Alternative Minimum	$2,275,951.00
	Foreign Tax Credit	$0.00
26)	Tentative Minimum Tax Line 24 less line 25	$2,275,951.00
27)	Regular Tax Liability less Foreign Tax Credit	$1,987,153.00
28)	ALTERNATIVE MINIMUM TAX. Line 26 less line 27	$288,798.00

Schedule 5—Continuation:

EXEMPTION WORKSHEET

1)	Enter $33,750 ($45,000 if MFJ. $22,500 if MFS)	$45,000.00
2)	Enter AMTI (line 21 from form 6251)	$8,134,645.00
3)	Enter $112,500 ($150,000 if MFJ. $75,000 if MFS)	$150,000.00
4)	Subtract line 3 from line 2. Not less than $0.	$7,984,645.00
5)	Multiply line 4 by 25%	$1,996,161.25
6)	Subtract line 5 from line 1. Not less than $0	$0.00

Sigitas J. Banaitis
SSN: 359-28-0184
Tax Year: 1995

Explanation of Adjustments

1(a) LitigationAward

It is determined that the taxable proceeds from your lawsuit against **Bank of California, N.A.** and **Mitsubishi Bank, LTD** are $8,103,559.00 rather than $1,421,420.00 for the taxable year 1995. The proceeds totaling $8,728,559.00 (which includes interest of approximately $2,550,484.00) are taxable to the extent of $8,103,559.00. All income is taxable unless it is specifically excludable. It has not been established that any amount greater than $625,000.00 is excludable. Accordingly, taxable income is increased $6,682,139.00 for the taxable year 1995.

1(b) Miscellaneous Itemized Deductions

It is determined that the allowable deduction for miscellaneous itemized deductions is $3,317,316.00 rather than $0.00 for the taxable year 1995. Attorney fees of $3,864,012.00 were incurred in connection with the litigation award in adjustment 1 (a), above. The total attorney fees have been prorated to the taxable portion of the award with $3,478,929.00 being allowable as a miscellaneous expense subject to the two percent of adjusted gross income limitation. Further, as a result of the adjustment made in 1(a), above, adjusted gross income has been increased thus increasing the two percent of adjusted gross income limitation. Accordingly, taxable income is decreased $3,317,316.00 for the taxable year 1995. See Schedule 3 for computation.

1(c) Itemized Deductions Limitation

It is determined that the allowable total Itemized deductions for the taxable year 1995 is $3,105,811.00 rather than $3,325,379.00 (total amount allowed after correction for adjustment 1(b), above)). As a result of the changes caused by adjustments 1(a) and 1(b), above, itemized deductions, adjusted gross income and the itemized deductions threshold for limiting itemized deductions have been recomputed as shown in Schedule 4. Accordingly, taxable income is increased $219,568.00 for the taxable year 1995.

10(a) Alternative Minimum Tax

It is determined that the alternative minimum tax is $288,798.00 rather than $0.00 for the taxable year 1995. As a result of adjustments 1(a), 1(b) and 1(c), above, the alternative minimum taxable income and alternative minimum tax has been recomputed as shown in Schedule 5. Accordingly, alternative minimum tax is increased $288,798.00 for the taxable year 1995.

UNITED STATES TAX COURT

Docket No. 4323-00

SIGITAS BANAITIS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

STIPULATION OF FACTS

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto may be accepted as authentic and are incorporated in this stipulation and made a part hereof; provided, however, that either party has the right to object to the admission of any such facts and exhibits in evidence on the grounds of relevancy and materiality, but not on other grounds unless expressly reserved herein, and provided, further, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. The petitioner, Sy Banaitis, resided in Clackamas County, Oregon, when he filed his petition in this case.

2. Attached hereto as Exhibit 1-J is a copy of the statutory notice mailed to Sy Banaitis on March 24, 2000.

3. Attached hereto as Exhibit 2-J is a copy of Sy Banaitis' timely filed federal income tax return for the taxable year 1995.

4. From 1980 to December 30, 1987, Sy Banaitis was employed as a Vice president and loan officer of the Bank of California, N.A., in Portland, Oregon. In 1984, the Mitsubishi Bank, Ltd., a member of the Mitsubishi Group, acquired a controlling interest in the Bank of California, N.A.

5. In 1986 and 1987, employees of the Mitsubishi Bank, Ltd., asked Sy Banaitis to disclose confidential information concerning privately held companies, which were his loan customers, and which competed against firms and enterprises of the Mitsubishi Group, the parent of the Mitsubishi Bank, Ltd. Sy Banaitis refused, to avoid violating his ethical and legal duties, confidentiality agreements, and Bank of California policy.

6. Employees of Mitsubishi Bank, Ltd., including Sy Banaitis' immediate supervisor, prepared negative performance evaluations, making accusations against the his integrity.

7. On December 30, 1987, Sy Banaitis was forced to leave his position at the Bank of California, N.A.

8. On November 15, 1989, Sy Banaitis retained the law firm of Merten and Associates to file a lawsuit against the Bank of California, N.A., and the Mitsubishi Bank, Ltd.

9. Attached hereto as Exhibit 3-J is a copy of the attorneys' fees agreement, which Sy Banaitis entered into with the firm of Merten and Associates.

10. The firm of Merten and Associates agreed to represent Sy Banaitis in a lawsuit against the Bank of California, N.A., and the Mitsubishi Bank, Ltd.

11. On December 12, 1989, Sy Banaitis filed a lawsuit against the Bank of California, N.A., and the Mitsubishi

Bank, Ltd., Case No. A8912-07357, in the Multnomah County Circuit Court for the State of Oregon. Attached hereto as Exhibit 4-J is a copy of the fourth amended complaint filed in that proceeding.

12. On March 18, 1991, the jury returned a verdict against the Bank of California, N.A., and the Mitsubishi Bank, Ltd., a co¡ y of which is attached hereto as Exhibit 5-J. The judgment, reflecting the jury's verdict is attached hereto as Exhibit 6-J.

13. The Bank of California, N.A., and the Mitsubishi Bank, moved the trial court for a judgment notwithstanding the verdict. The motion was granted in part, setting aside the verdicts for punitive damages. Attached hereto as Exhibit 7-J is a copy of the judgment, reflecting the judgment notwithstanding the verdict.

14. On June 20, 1991, Sy Banaitis appealed to the Oregon Court of Appeals.

15. On July 22, 1991, Sy Banaitis entered into an attorneys' fees agreement with the firm of Merten and Associates, a copy of which is attached as Exhibit 8-J, to cover the attorneys' fees for the appeal.

16. On August 3, 1994, the Oregon Court of Appeals entered a decision which reinstated the jury's verdict. Attached hereto as Exhibit 9-J is a copy of the court's opinion.

17. On October 26, 1995, Sy Banaitis entered into a settlement agreement with the Bank of California, N.A., and the Mitsubishi Bank, Ltd. A copy of the settlement agreement is attached as Exhibit 10-J. Attached as Exhibits 11-J and 12-J are copies of the checks made payable to Sy Banaitis and to Charles J. Merten, respectively.

18. The parties stipulate to the admissibility of the following exhibits:

Exhibits No.	Description
1-J	Notice of deficiency
2-J	Sy Banaitis' 1995 income tax return
3-J	Attorneys' fee agreement, dated 11/15/89
4-J	Fourth amended complaint
5-J	Jury verdict
6-J	Judgment, reflecting verdict
7-J	Judgment, reflecting judgment notwithstanding the verdict
8-J	Attorneys' fee agreement, dated 7/22/91
9-J	Opinion of the Oregon Court of Appeals
10-J	Settlement agreement, dated 10/26/95
11-J	Check payable to Sy Banaitis
12-J	Check payable to Charles merten
13-J	Sy Banaitis' authorization to release medical records to Merten and Associates, dated 11/15/89
14-J	Sy Banaitis' general authorization for release of hospital, medical, and other records to Merten and Associates, dated 11/15/89

Exhibits No.	Description
15-J	Letter from Charles Merten to David W. Waldram, M.D.
16-J	Letter from Charles Merten to William Winans, D.O.
17-J	Letter from Charles Merten to Robert Berselli, M.D.
18-J	Letter from Charles Merten to Roger J. Miller, R.P.T.
19-J	Testimony of Edward Colbach in case of Banaitis v. Mitsubushi Bank, Ltd. and Bank of California
20-J	Jury instructions in case of Banaitis v. Mitsubishi Bank, Ltd. and Bank of California, N.A.
21-J	Memorandum Opinion of Oregon Supreme Court
22-J	Letter from Charles Merten to Theodore Kulongoski
23-J	Internal Revenue Service Form 1099-MISC instructions for 1995
24-J	Internal Revenue Service Publication, 907 for the year 1995

Exhibits No.	Description
25-J	Letter Interpretation between Sy Banaitis and Charles Merten, dated 7/22/91

RICHARD W. SKILLMAN
Acting Chief Counsel
Internal Revenue Service

/s/ JOSEPH WETZEL
JOSEPH WETZEL
Counsel for petitioner
Tax Court No. WJ0903
Wetzel DeFrang & Sandor
300 Dayton Building
838 S.W. First Avenue
Portland, OR 97204
Tel . No. (503) 220-0299

Dated: [Feb. 7, 2001]

By: [Stamp of SHIRLEY M. FRANCIS]
SHIRLEY M. FRANCIS
Attorney (SBSE)
Tax Court No. FS0247
620 S.W. Main Street, Ste. 312
Portland, OR 97205
Tel . No.(503) 326-3186

Dated: [Feb. 8, 2001]

CONTINGENT FEE RETAINER AGREEMENT

(Statutory Attorneys Fees)

The Client, Sy Banaitis, retains the law firm of Merten & Associates to represent Client in connection with: The Bank of California and others.

We agree as follows:

1. **Attorneys Fees.** The attorneys fees to be paid to the law firm of Merten & Associates shall be a percentage of the gross recovery, as follows:

   a. If a settlement is reached prior to the start of a trial, arbitration, hearing, or other proceeding, then one-third (33-1/3%) of the gross recovery shall be paid as the attorney fee.

   b. If a trial, arbitration, hearing, or other proceeding has **started** and a settlement, judgment, or other recovery thereafter occurs, then forty percent (40%) of the gross recovery shall be paid as the attorney fee.

For purpose of this agreement, a proceeding "starts" when, on the day that it is scheduled, any activity involving a judge or arbitrator is begun, including a conference.

2. **Statutory Attorneys Fees.** There is a chance that a court may award you statutory attorneys fees to be paid by the other side. If such an award is made, it will be credited towards what you owe under paragraph (1), Attorney shall keep the excess.

3. **Appeal.** Attorney does not now agree to represent Client on an appeal. If Client and Attorney, agree in the future to pursue or defend an appeal, we will negotiate a

separate fee for the appeal. Under ordinary, circumstances, any contingent fee on appeal would **be no less than** an additional ten percent (10%) of the recovery.

4. **Structured Settlement.** If all or part of the recovery is based upon a structured settlement, the attorneys fee shall be based on the present cash value of the total recovery. If Client chooses not to structure Client's portion of a settlement, Attorney is nonetheless authorized to accept a structured payment of the attorneys fee directly from the adverse party.

5. **Expenses.** The Client shall pay any and all out-of pocket expenses incurred on behalf of the Client by Merten & Associates in pursuing this claim. Client shall be billed monthly for expenses and Client shall pay the same within ten days of billing. If not so paid, Client agrees that interest at 9% per annum may be charged to Client. Any, unpaid expenses and interest at the time of recovery shall be deducted from the Client's share of any recovery. If there is no recovery, the Client remains responsible to reimburse the attorney for all expenses advanced on behalf of the Client, plus interest. Attorney will consult with Client prior to incurring any single expenditure of $1,000 or more.

6. **Settlement Consultations.** Any settlement offer will be discussed with Client. Attorney will obtain Client's approval before acceptance or rejection of a settlement on Client's behalf.

7. **Termination.** If the Client fails or refuses to comply with the terms of this agreement, to make payment of the expenses or interest when due, to cooperate in the preparation of the claim, unreasonably rejects a bonafide settlement offer, or insists on pursuing a claim which, in the attorney's opinion, does not warrant

further effort, then Merten & Associates may terminate its services. In the event of termination, Attorney is entitled to the reasonable value of the professional services rendered and to reimbursement of any outstanding expenses and interest. Client agrees that the reasonable value of Mr. Merten's services is $175.00 per hour.

8. **No Guarantee.** Client acknowledges that Attorney makes no guarantee or representation regarding the successful termination of the above matter.

9. **Attorney's Discretion.** Attorney has complete discretion to use staff and/or consultants for all work assignments.

10. **Bankruptcy.** If Client files for or is subjected to proceedings, Attorney shall be entitled, as a fee, to no less than $175.00 per hour for all professional time on this matter.

11. **Collection.** In the event it is necessary to place this agreement in the hands of any agency or attorney for collection due to failure to pay fees, expenses or interest when due, it is agreed that reasonable attorneys fees are to be paid to the prevailing party for all legal work done.

12. **Full Discussion.** Client hereby acknowledges that Client has read and received a copy of this Agreement. Attorney has explained its terms and has answered any questions Client has concerning this Agreement and allowed Client a reasonable period of time to consider its terms and conditions before signing it.

13. **Cancellation. Client may rescind and cancel this agreement upon giving written notice to Merten & Associates within two business days of the date below.**

Client acknowledges receipt of a copy of this Agreement.

MERTEN & ASSOCIATES CLIENT

BY: /s/ CHARLES MERTEN /s/ SY BANAITIS

Date: Nov. 15, 1989

ADDENDUM

For purposes of paragraphs 7 and 10 of this agreement, it is agreed that Attorney's current reasonable and hourly rates are:

Charles J. Merten:	$175.00 per hour
Karen L. Fink:	140.00 per hour
David Paul:	100.00 per hour
Paralegals:	40.00 per hour

CHARLES MERTEN
Attorney

Date: [11-15-89]

/s/ SY BANAITIS
Client

Date: [Nov. 15, 1989]

FEE AGREEMENT

This agreement is between Sigitas Banaitis ("Client") and Charles J. Merten ("Attorney"), this agreement acknowledges past services of Attorney on behalf of Client and defines the terms of future services.

A. **Pre-Appeal Events & Agreements:**

1. Attorney represented Client in a lawsuit against Mitsubishi Bank, Ltd. (MBL) and the Bank of California, N.A. (BCal) for Wrongful Termination and Intentional Interference with Contract. On March 18, 1991 a jury returned a verdict in favor of Client in the total amount of $6,271,389.

2. Under the fee agreement between Client and Attorney with respect to Attorney's services through trial (the "First Agreement"), Client and Attorney agree that Attorney was and is entitled to 40% of the gross recovery against MBL and BCal for Attorney's services through trial, plus 40% of the accumulated interest on such gross recovery through date of collection. Client and Attorney agree that under the First Agreement, "gross recovery" means the total amount payable by MBL and BCal regardless of to whom paid. Further, Client and Attorney agree that under the First Agreement, Attorney is entitled to reimbursement from Client for any and all expenses advanced by Attorney on behalf of Client.

3. On April 1, 1991 a judgement ("Original Judgment") in the amount of $6,271,389 was entered against MBL and BCal but said judgment was set aside on May 24, 1991 by the trial court and a new judgment ("JNOV") in the amout of $1,271,389 was entered on that date. The JNOV is for compensatory damages only, as the trial

court set aside the $5,000,000 awarded by the jury for punitive damages.

4. The jury verdict and Original Judgment awarded $1,146,389 in compensatory damages and $3,000,000 in punitive damages against MBL. The jury verdict and Original Judgment awarded $771,389 in compensatory and $2,000,000 in punitive damages against BCal. MBL and BCal were jointly and severally liable for $646,389 of the compensatory damages and severally liable for the balance of the respective awards against them.

5. Client and Attorney agree that, as to the jury verdict and Original Judgment amount, Attorney is entitled to $2,508,555.60 in fees for services rendered through trial, plus all accumulated interest on that amount.

6. Client and Attorney agree that, as of May 30, 1991, Client owes Attorney $10,157.93 with respect to expenses advanced by Attorney on behalf of Client.

7. Client and Attorney had understood and agreed, and hereby ratify, that under First Agreement Attorney's total fee was to be paid first out of any punitive damage award, and that not until said punitive damage award, if any, was exhausted would Attorney's fee be paid out of any compensatory damages award and that to the extent that any of Attorney's total fees were payable out of a compensatory damage award, the full amount so payable would come first from any economic damage award and secondly from any noneconomic damage award.

8. MBL and BCal have applied from the JNOV. It is anticipated that they will argue, among other things, that they have no liability to Client whatsoever and, therefore, owe him nothing.

9. Client authorized Attorney to file an appeal from the JNOV, which was done June 20, 1991. On appeal, Client will seek to have all or part of the punitive damages award reinstated, and will seek to hold on to all the compensatory damage award.

10. Client and Attorney have discussed the "appeal" process. For purposes of this agreement, "appeal" means review by the Oregon Court of Appeal of the JNOV, any attempt by either Client or MBL and BCal to have the Oregon Supreme Court review the JNOV and/or decision of the Oregon Court of Appeals, and any attempt by Client or MBL and BCal to have the United States Supreme Court review the JNOV and/or decision of the Oregon Court of Appeals and/or decision of the Oregon Supreme Court. "Appeal" does not, for purposes of this agreement, include any appellate process after a remand for retrial, nor does it include services at a retrial.

11. The First Agreement did not set the terms of Attorney's compensation for services in connection with the appeal which is now pending and Client and Attorney are creating this agreement, in part, in order to set those terms.

B. **Client and Attorney Hereby Agree as Follows with Respect to Compensation of Attorney in Light of his Additional Services on Appeal:**

1. If the jury verdict and/or Original Judgment is fully reinstated, Attorney shall receive as his fee $2,691,224 plus the accumulated interest on said $2,691,224 through date of collection. Said fee shall be payable from the punitive damages.

2. If the JNOV is affirmed in whole or in part and no punitive damages are recoverable by Client, Attorney shall receive 50% of the compensatory damages payable by MBL and/or BCal, plus 50% of the accumulated interest due through date of collection.

3. If the jury verdict and/or Original Judgment is fully reinstated as against MBL but no damages are recoverable as against BCal, Attorney shall received $1,860,576 plus accumulated interest on said $1,860,576 through date of collection. Said fee shall be payable from punitive damages.

4. If the jury verdict and/or Original Judgment is fully reinstated as against BCal but no damages are recoverable as against MBL, Attorney shall received $1,243,950 plus accumulated interest on said $1,243,950 through date of collection. Said fee shall be payable from punitive damages.

5. If the jury verdict and/or Original Judgment is fully reinstated as against MBL but only the existing compensatory damages are recoverable as against BCal, Attorney shall receive $1,923,077 plus the accumulated interest on the said $1,923,077 through date of collection. Said fee shall be payable from the punitive damages.

6. If the jury verdict and/or Original Judgment is fully reinstated as against BCal but only the existing compensatory damages are recoverable as against MBL, Attorney shall receive $1,493,950 plus the accumulated interest on said $1,493,950 through date of collection. Said fee shall be payable from the punitive damages.

C. **Client and Attorney Further Agree as Follows:**

1. Client is to pay on or before August 2, 1991 all reimbursed sums Attorney has advanced on behalf of

Client. As of this date, said sums are $10,500, more or less a few dollars.

2. Starting on October 1, 1991, and on the first day of each month thereafter until the appeal is concluded, client is to pay $500.00 to Attorney towards expenses related to the appeal. Attorney will place said sums into a trust account and is authorized to draw therefrom as expenses are advanced on behalf of Client. Attorney will itemize said expenses and provide client the itemization. Client will not have to pay the $500 in any month following a month where, on the 25th day of the latter, Client's trust account balance was $1,500.00 or more.

3. If a judgment is affirmed or entered against MBL and/or BCal after the appeal, Attorney's services on appeal are hereby deemed to include, and be limited to, efforts to collect said judgment only in Oregon. If collection work is required to be done in other states or countries, or if other attorneys or entities are hired to collect on the judgment within or without the State of Oregon, Attorney and Client shall share the cost of such services in proportion to their then percentage interests in judgment amount sought to be collected.

4. If Client terminates Attorney's services before Client's first brief is filed in the Oregon Court of Appeals, it is agreed that Attorney is entitled to 40% of whatever the total sum MBL and/or BCal is or becomes obligated to pay to or on behalf of Client and/or the State of Oregon and/or Client's attorneys, plus accumulated interest on said 40%, plus $175 per hour for all attorney time of Charles J. Merten & Associates from and after May 24, 1991.

5. If Client terminates Attorney's services after Client's first brief is filed in the Oregon Court of Appeals,

it is agreed that Attorney is entitled to all the compensation described and/or agreed to in paragraphs B above and C(7) below.

6. Attorney may, at his discretion, retain or hire other attorneys to assist him with the appeal. If Attorney does so, client shall not be responsible for compensating said attorneys, and Attorney shall compensate them out of his own pocket and/or by sharing his fee due under this agreement; provided, however, that if paragraph C(4) applies, then such other attorneys shall receive their standard hourly rates from Client (not to exceed $175/hour).

7. (a) If all or part of the case is remanded by an appellate court for retrial, Attorney agrees to retry case for client.

(b) If such a remand occurs and thereafter the case is retried or settled by Attorney, Attorney is entitled to a fee equal to 50% of all sums allocated to compensatory damages and accumulated interest thereon, and 42.9127263% of all sums allocated to punitive damages and accumulated interest thereon; and said fee shall be payable first out of any and all sums allocated and recovered on account of punitive damages and then, and only then, out of other forms of recovery.

(c) If Attorney, because of death or incapacity, is not capable of retrying the case after full or partial remand and Client is thereby required to retain new counsel for a retrial, and said new counsel tries or settles the case, then as to those damages and sums at issue after remand new counsel shall be given his share of the recovery, and Client and Attorney shall allocate the balance in accordance with paragraph C(7)(b).

8. If Client's case is settled prior to the final court decision in the appeal process describe in paragraph A(10) above, the Attorney shall be compensated as followed:

(a) If the case is settled prior to Client's first brief being filed in the Oregon Court of Appeals, Attorney shall receive 40% of whatever total sum, including interest, the case is settled for, plus $175 hour for all Attorney time from and after May 24, 1991;

(b) If the case is settled after Client's first brief is filed in the Oregon Court of Appeals, Attorney shall receive all compensation described and/or agreed to in paragraph B above.

9. Client hereby acknowledges that he has read and received a copy of this Agreement. Attorney has explained its terms and has answered any questions Client has concerning this Agreement and allowed Client a reasonable period of time to consider its terms and conditions before signing it.

10. Paragraph B, C(5), C(7), and C(8) set out a contingent fee agreement for services on appeal and possible retrial. Client may rescind and cancel said contingent fee agreement upon giving written notice to Merten & Associates with two business days of the date below.

Dated: [July 22, 1991] /s/ SY BANAITIS
SIGITAS BANAITIS

Dated: [7-22-91] /s/ CHARLES J. MERTEN
CHARLES J. MERTEN

LETTER INTERPRETATION

On this date Sigitas Banaitis (Banaitis) and Charles J. Merten (Merten) are simultaneously executing a fee agreement concerning Merten's compensation with respect to the case of (*Banaitis v. Mitsubishi Bank, Ltd., et, al.*, Mult. Co. Cir. Ct. Case No. A8912-07357, CA A70113). This case currently is on appeal. One significant point of the fee agreement is the acknowledgment by both Banaitis and Merten that Merten's to-date earned share of whatever is payable now or in the future by Mitsubishi Bank, Ltd. and/or the Bank of California is 40%, including 40% of any accumulated interest, on whatever judgment is eventually approved or settlement made.

Another significant, aspect of the fee agreement executed today is the setting of Merten's over-all compensation, including his compensation for appeal work; under various hypothetical results of the appeal. Banaitis and Merten hereby agree that the correct interpretation of the fee agreement is that Merten is entitled to the sums set forth in that agreement under the described hypotheticals even if the State of Oregon objects and/or is successful in objecting to the fact or manner in which we have made Merten's fee payable out of any punitive damage recovery and even though the fee agreement says that Merten's total fees are payable, in some instances, out of the punitive damage recovery. Banaitis acknowledges and agrees that Merten makes no warranty, promise, representation, or agreement that the State of Oregon will object and/or will not successfully object to our making Merten's total fee payable out of punitive damages in some of the hypotheticals. Banaitis also acknowledges and agrees that no part of Merten's fee is dependent upon the failure of the State of Oregon

to object or successfully object to the way we have agreed Merten is to be paid in the fee agreement. Banaitis agrees that Merten is entitled to the sums set forth in the fee agreement as payable to Attorney even though the State of Oregon, or a judge or a court requires that Banaitis take less and allows the State of Oregon to take more as a result of ORS 18.540.

The fee agreement discusses many hypothetical recoveries after appeal. Banaitis and Merten agree that, whatever the result and whether the result be unforeseen or foreseen, the correct interpretation of the simultaneous fee agreement is that Merten is to get 50% of all payable compensatory damages and 42.9127263% of all payable punitive damages, regardless of to whom payable, plus accumulated interest on those respective amounts from whatever date the law allows client to start accumulating interest.

The interpretations set out in this Letter Interpretation govern and control any other possible interpretation of the provisions of the Fee Agreement between Banaitis and Merten concurrently signed this date.

Dated: [July 22, 1991] /s/ SY BANAITIS
SIGITAS BANAITIS

Dated: [7-22-91] /s/ CHARLES J. MERTEN
CHARLES J. MERTEN

SETTLEMENT AGREEMENT
and
MUTUAL RELEASE

This agreement is made on the *26* day of October, 1995 between Sigitas Banaitis and Mitsubishi Bank, Ltd. and Bank of California, N.A., referred to hereafter as "the Banks," with the intent of resolving all disputes between Banaitis and the Banks.

Banaitis brought an action in the Circuit Court of the State of Oregon for Multnomah County, No A8912-07357 against the Banks. In his Fourth Amended Complaint, he asserted tort claims involving emotional distress, punitive damages and economic loss. He obtained a judgment notwithstanding the verdict against the Banks in the amount of $1,271,389 in compensatory damages, with interest to commence on March 26, 1991. On appeal to the Court of Appeals, the verdict for $3,000,000 against Mitsubishi Bank and $2,000,000 against Bank of California for punitive damages was ordered to be reinstated. The Supreme Court of Oregon allowed the Banks' petition for review, but later dismissed review as improvidently granted. The Banks have moved for a stay of judgment to allow a petition for certiorari to be filed in the United States Supreme Court challenging the validity of the award of punitive damages. The Appellate Judgment of the Oregon Supreme Court has not yet issued.

The parties desire to resolve and compromise their dispute by a payment of money by the Banks to Banaitis and to his attorney in an amount which reflects a compromise on punitive damages and by the dismissal of the action by Banaitis. In addition Banaitis agrees that a portion of the settlement payment should be made

directly to his attorney, Charles J. Merten, in payment of attorney fees earned by Merten as a result of this matter.

THEREFORE, the parties agree as follows:

1. On October 26, 1995, the Banks will pay to Banaitis and Charle J. Merten, attorney for Banaitis, their cashier's check in the total amount of $8,728,559. If the payment is made on a later day, there will be added to the total payment the sum of $1,546 per day after October 26, 1995. If the payment is made on an earlier date, $1, 546 per day will be deducted from the amount.

A Bank of California, N.A., cashier's check made payable to Charles J. Merten in payment of attorney fees in the amount of $3,864,012 (plus or minus his pro rata share of interest adjustments described in this section I) and a Mitsubishi Bank, Ltd., cashier's check made payable to Sigitas Banaitis in the amount of $4,864,547 (plus or minus his pro rata share of interest adjustment described ill this section I) shall be delivered to the payees upon execution of this agreement.

2. Banaitis' action against the Banks will be dismissed without entry of judgment. If the court does not allow vacation of the judgment notwithstanding the verdict, then Banaitis or his attorney, Charles J. Merten, will acknowledge that it has been satisfied. Banaitis and the Banks will execute and file all documents reasonably necessary to accomplish this result.

3. The Banks, Banaitis and his attorney, Merten, promise that they will keep the amount of this settlement confidential. Banaitis and Merten may inform the Justice Department of the State of Oregon insofar as is necessary to comply with the law relating to punitive damages. Upon dismissal of the action or receipt of satisfaction is provided in paragraph 2, the Banks may notify the

Oregon Department of Justice that the case has been settled and refer the department to attorney Merten for further information. The Banks, Banaitis and Merten may inform their employees and agents designated to carry out the terms of this agreement. They may inform their spouses, their attorneys, then accountants and then financial planners and investment counselors in confidence and they may inform taxing authorities as necessary. Other than those exceptions, they may reveal the amount of this settlement only as required by law. These are the only exceptions to the promise of confidentially.

4. Upon execution of this document and the payment of the settlement funds as specified in paragraph 1, Banaitis and the Banks mutually release each other and their respective agents, employees, successors, assigns and affiliated organizations from any and all claims or liability, known, relating to Banaitis' employment and termination by the Banks.

5. This agreement may be signed by the parties in counterpart originals

/s/ SY BANAITIS
SIGITAS BANAITIS

/s/ CHARLES J. MERTEN
CHARLES J. MERTEN
personally and as attorney for Sigitas Banaitis

Mitsubishi Bank, Ltd

by /s/ SHOTA YASUDA
SHOTA YASUDA,
Executive Vice President
North American Headquarters

Bank of California, N. A.

by /s/ MICHAEL T. CONNELL
MICHAEL T. CONNELL
Vice President

Banaitis Settlement

Amount of Settlement	$8,728,559
Contingent Lawyer Fee	<$3,864,012>
Litigation expenses	<$ 30,000>
	$4,834,547
Tax paid in 1996 for interest on settlement (federal and state)	<$ 679,624>
	$4,154,923
Amount paid to State of Oregon in settlement under ORS 18.540 (punitive damage splitting statute)	<$ 150,000>
	$4,004,923
Tax demanded by Internal Revenue Service	<$1,708,216>
	$2,296,707
Tax demanded by State of Oregon	<$ 195,051>
	$2,101,656
Legal fees for State of Oregon issue and federal and state taxes	< $ 117,578>
	$1,984,078